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No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HISPANIC COALITION ON REAPPORTIONMENT, *et al.*,

Appellants,

—v.—

LEGISLATIVE REAPPORTIONMENT COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did the federal district court below err when it dismissed Appellants' claims by drawing inferences contrary to law and uncontested evidence that Hispanics' voting strength was intentionally diluted to deny them a state assembly district in which they constituted a majority of the population?

2. Was legislative privilege impermissibly applied to effectively bar evidence necessary for a judicial determination in a voting rights action?

3. Were protective orders erroneously granted on the basis of legislative privilege to preclude Appellants from gaining information to establish a discriminatory purpose in the creation and adoption of a reapportionment plan?

4. Is a state representative's good faith representation that he acted in a legislative capacity sufficient to cloak him with immunity when there is evidence to the contrary?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below in the United States District Court for the Eastern District of Pennsylvania were the Hispanic Coalition on Reapportionment; Alfred Delgado, Nitza Santiago, Nayda Cintron, Julio Olmedo and persons similarly situated who are registered voters in the City of Philadelphia, plaintiffs below; and the Legislative Reapportionment Commission; the Democratic Party City Committee of Philadelphia, its chairman David Glancey and State Representative Robert O'Donnell in their official capacities; William R. Davis, the secretary of the Commonwealth of Pennsylvania, his successor—if any—and agents, assignees, and employees, defendants below. They are the same parties herein, the plaintiffs as Appellants, the defendants as Appellees.

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JURISDICTIONAL STATEMENT

Appellants Hispanic Coalition on Reapportionment; Alfred Delgado, Nitza Santiago, Nayda Cintron, and Julio Olmedo, individually and on behalf of all others similarly situated appeal from the order of the three-judge panel of the United States District Court for the Eastern District of Pennsylvania dated April 6, 1982 dismissing claims against all defendants that a statewide reapportionment plan for the State Assembly was enacted in pertinent part with the discriminatory purpose of diluting Hispanic voting strength in the City of Philadelphia. Appellants also appeal from protective orders entered during trial on March 16, 1982, and in rulings on motions on March 4, 1982.

OPINIONS AND RULINGS BELOW

The decision of the United States District Court for the Eastern District of Pennsylvania dated April 6, 1982, is unreported. It is reprinted at page 3 of the Appendix to this Jurisdictional Statement. Rulings on Motions for Protective Orders of the single district judge of March 4, 1982, and adopted by the three-judge panel on March 16, 1982, also are unreported. They are reprinted at page 19 of the aforementioned Appendix, and in the Trial Transcript at page 107.

JURISDICTION

This is an appeal from a dismissal of a voting rights challenge to a statewide reapportionment of the Pennsylvania General Assembly. Preliminary and permanent injunctive relief was denied.

Appellants claim that the reapportionment plan in pertinent part was intended and effected to diffuse the voting strength of Hispanics in Philadelphia, in violation of the Fourteenth and Fifteenth Amendments to the Constitution; Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973; and the Civil Rights Act of 1866, 42 U.S.C. § 1983.

Federal subject matter jurisdiction was invoked by Appellants pursuant to 28 U.S.C. § 1343 (3) and (4); and 28 U.S.C. §§ 2201 and 2202 for declaratory relief. A three-judge district court was convened in this matter, pursuant to 28 U.S.C. § 2284(a) on February 16, 1982. On April 6, 1982, the three-judge court entered a memorandum opinion and order dismissing Appellants' claims on grounds that they failed to show entitlement to relief against the Commonwealth of Pennsylvania and its Legislative Reapportionment Commission, and improperly joined other parties. A notice of appeal to the United States Supreme Court was filed on May 12, 1982, in the United States District Court for the Eastern District of Pennsylvania (Appendix [hereafter A]-54).

This Court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1253. This action meets all the requirements of § 1253 since it is a challenge to the constitutionality of a

reapportionment of a statewide legislative body required to be heard by three judges[1] and temporary and permanent injunctive relief has been sought throughout these proceedings *Carter v. Stanton*, 405 U.S. 669 (1972). Under these circumstances, this Court has appellate jurisdiction.[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment XIV, Section 1 provides that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The United States Constitution, Amendment XV, provides that:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

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1 See Senate Report No. 94-204, 94th Cong., 2nd Sess. (1976), reprinted in (1976) U.S. Code Cong. & Ad. News 1988.

2 On May 5, 1982, Appellants filed a Notice of Appeal to the U.S. Court of Appeals for the Third Circuit (A-57) in the United States District Court for the Eastern District of Pennsylvania for the sole purpose of preserving the right to an appeal in the event that this Court deems it lacks jurisdiction. See *Swift & Co. v. Wickham*, 382 U.S. 111 (1965).

42 United States Code Section 1973 provides that:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.[3]

42 United States Code Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

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3 This provision recently was reenacted and became effective June 29, 1982, in the following form:

> Section 2. (a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 4(f)(2), as provided in subsection (b).
>
> Section 2. (b) A violation of subsection (a) is established if based on the totality of circumstances it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one "circumstance" which may be considered. ____ Stat. ____ (1982), Pub.L. 97-209, June 29, 1982.

STATEMENT OF THE CASE

The issues raised by this appeal focus on the requirements that must be met by persons and groups, such as Appellants, to establish discriminatory purpose and effect in the creation and adoption of an allegedly unconstitutional reapportionment plan, and the impediments that can be placed in their way to prevent the gathering and offering of evidence necessary to meet the standards of proof required by this Court. In question are a reapportionment plan for the Pennsylvania General Assembly (hereafter Assembly) and its effect on a fairly sizeable Hispanic community in Philadelphia.

Reapportionment of the Assembly in the Commonwealth of Pennsylvania (hereafter Commonwealth) is a task specifically delegated to a Legislative Reapportionment Commission. The Commission is statutorily created for the sole purpose of promulgating preliminary and final plans for the reapportionment of the election districts for the Assembly and the State Senate and conforming them to constitutional requisites (A-4).

The final plan becomes law unless exceptions to it are taken. If the plan is challenged, it becomes law only after approval by the Supreme Court of the Commonwealth (A-5).

In this case, the Legislative Reapportionment Commission (hereafter Commission) was constituted by February, 1981, to create and adopt such a plan for the 1980s. Its membership consisted of two Commonwealth Senators, Robert C. Jubelirer and Edward Zemprelli; two Commonwealth Representatives, Samuel E. Hayes and James J. Manderino; and a chairperson selected by them. The chairperson was James O. Freedman.

The Commission filed its preliminary plan (A-7) on August 20, 1981, and its final plan (A-8) on October 13, 1981. Despite numerous exceptions, the final plan was approved in a 4-3 decision by the Supreme Court of Pennsylvania on December 29, 1981. That Court subsequently denied numerous petitions for rehearing.

The reapportionment plan created 203 seats for the General Assembly. Given the total population for the Commonwealth, the ideal district would have consisted of 58,456 people (A-5). Hispanics in Philadelphia number approximately 63,000; most

of them live in a compact and contiguous section in North Central Philadelphia (A-5).

After the Supreme Court rendered its initial decision and stated that no evidence was provided to show any intent to discriminate in the creation and adoption of the reapportionment plan, Hispanics[4] learned that a television interview had been videotaped that might provide information to the contrary. Acting as a group and as individual registered voters, certain Hispanics, Appellants herein, obtained a transcript of that interview. That transcript was admitted into evidence in its entirety (A-148 *et seq.*).

The interview, of Philadelphia Democratic City Committee Chairman David Glancey, and other related information demonstrated that Hispanics were singled out as a group for disparate treatment in the reapportionment process (A-6).

Glancey devised a strategy for the City Committee (hereafter Committee) for a reapportionment plan for Philadephia (A-6). He transmitted information in accordance with that strategy to State Representative Robert O'Donnell (A-6). O'Donnell stated at trial that he was working on behalf of Commission member James Manderino to ascertain the views of the people of Philadelphia (A-6). A Philadelphia newspaper article referred to at trial stated: "The House plan was written by State representative O'Donnell, a Germantown Democrat, under the guidance of City Democratic Chairman David B. Glancey, (A-122)." (See A-10.)

The Glancey strategy in pertinent part was to cause the creation of a preliminary plan that would deliberately diffuse the Hispanic community of Philadelphia, to leave little opportunity for the election of an Hispanic representative (A-6). The strategy was intended by Glancey to force a strong reaction from Hispanics so that major readjustments would have to be made for the final reapportionment plan. These adjustments would have allowed the Philadelphia Democrats to be in a

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4 Puerto Ricans comprise almost the entire Hispanic community in Philadelphia. In the proceedings, Puerto Ricans and Hispanics were used interchangeably to refer to the affected group. Herein "Hispanic" will be the term used to refer to the affected community and "Hispanics" to the affected individuals.

stronger negotiating position with the Republicans (A-6). Neither Glancey nor anyone else associated with the political process ever expressed an intention to create a final plan for Philadelphia that would include an Assembly district with Hispanics in the majority, even if that were possible.

The preliminary plan put forth by the Commission was similar in all material respects to the Glancey strategy. That plan failed to provide for any Assembly district in which Hispanics constituted more than 15% of the population (A-7). At a public hearing, Hispanics testified and urged the Commission to create an Assembly district in which Hispanics would have an opportunity to maximize their voting strength (A-7). The AFL-CIO submitted a proposed plan that would provide a Philadelphia Assembly district in which Hispanics would comprise more than a majority of the population.

The final plan later adopted by the Commission and approved by the Pennsylvania Supreme Court provided for no Assembly district in which Hispanics constituted a majority. Testimony at trial revealed that both the Commission and O'Donnell knew such an Assembly district could be created in North Central Philadelphia that met all other constitutional requirements. Further undisputed evidence was presented that Commission Chairperson Freedman saw no reason to create such an Assembly district.[5] The area in question in the final plan contained a population in which the Hispanic proportion was little more than 40 per cent. The remainder had been fenced out and diffused into other Assembly districts.

Having accumulated some evidence of discriminatory purpose in the creation of the reapportionment plan and realizing the discriminatory impact on Hispanics, Appellants timely filed a complaint in the United States District Court for the Eastern District of Pennsylvania against the Commission, the Committee, Glancey and O'Donnell. On February 18, 1982, Appellants filed an amended complaint to include William R. Davis, as Secretary of the Commonwealth as a defendant.

The district court judge below convened a three-judge court (A-53); denied Appellants' request for a temporary restraining

5 The specifics of the testimony and the appropriate pages in the Appendix are provided *infra*, at 13.

order to prevent the reapportionment plan from being implemented (A-51); and made a critical ruling effectively barring Appellants from gathering and using information about the actions of the Commission and its relationship to the Committee or the Glancey strategy (A-19 *et seq.*).

That ruling came in response to motions for protective orders from the Commission and O'Donnell to bar the taking of depositions of O'Donnell himself and Commission Chairperson Freedman. The district court judge granted the Commission's motion based on the legislative privilege enjoyed by Freedman as a member of the Commission (A-44). O'Donnell's motion was granted in part and denied in part. The single judge ruled that O'Donnell also enjoyed the benefits of the privilege to the extent that he was acting in a legislative capacity, but not to the extent that he was engaged in political or private activity (A-44). After asking plaintiffs' counsel to explain why such orders should not be granted, the judge ruled with regard to O'Donnell that he relied on the good faith of counsel and the witness to determine the scope of the inquiry (A-43).

At trial, the three-judge court affirmed the rulings on the protective orders with respect to O'Donnell (A-107). O'Donnell then stated that in all relevant respects he had acted in his legislative capacity and in his judgment he could not be questioned about his role in the reapportionment process (A-109). Limited questioning of him was allowed thereafter.

Appellants called five witnesses, including O'Donnell and Glancey.[6] At the close of their case, defendants below moved for an involuntary dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. After the Commonwealth presented one witness,[7] the three-judge panel ruled that it would decide the motions as if no evidence were presented by the defendants (A-13).

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6 Commission Chairman Freedman was not called, because all inquiry of him had been denied during discovery.

7 The Commonwealth presented a witness who described the process and costs for implementation of the reapportionment plan.

In an opinion and order of April 6, 1982, from which this appeal is taken, the court below dismissed all claims against the Commission and the Secretary of the Commonwealth because of Appellants' failure to show entitlement to relief. The Court also dismissed the Committee, Glancey and O'Donnell on grounds that they were improperly joined as parties (A-1). Appellants do not dispute the court's conclusion that the Committee, Glancey and O'Donnell were improperly joined as parties.[8] Instead Appellants raise novel and substantial questions about evidence needed to show discriminatory purpose and effect in the creation and adoption of a statewide reapportionment plan and what evidence may be obtained and used when parties involved in creation and adoption of such a scheme assert legislative privilege.

THE QUESTIONS PRESENTED ARE NOVEL AND SUBSTANTIAL

This voting rights action taken by Hispanics requires delineation of the proof needed to establish discriminatory purpose and effect in the creation and adoption of a reapportionment plan not covered by Section 5 of the Voting Rights Act of 1965, as amended.

Such plans invariably are drawn by legislators and their agents who may, as here, assert legislative privilege in an attempt to bar the tracing of discriminatory purpose back to the initial conception of such a scheme.

Appellants contend that the single judge below erred in denying discovery of Commission members, and in granting a protective order to a state legislator, who then was free to avoid answering all questions about how he acted as a go-between for a Commission member and a political party with an influential role in drawing lines for a reapportionment plan.

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8 Neither would Appellants contest here that the Commission is immune from suit—a defense raised on which the court below stated it was unnecessary to rule (A-11, n. 4). See *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980).

The three-judge court likewise erred in similarly limiting questions to that state legislator at trial.

The link between political powers and the reapportionment agents acting for a legislative body is critical in tracing a plan said to be discriminatory on its face, and as applied to a particular racial or ethnic group. That link here was broken by the invocation of legislative privilege.

The court below then made erroneous inferences that the Commission acted appropriately, regardless of the diffusion of Hispanics in an Assembly district in Philadelphia in its preliminary plan, despite its failure to provide a district in which Hispanics constituted a majority of the population after being shown that one could be established. In a case arising under Section 2 of the Voting Rights Act, this Court has not set forth a standard for judgment of what constitutes dilution of an affected minority's voting strength. The court below incorrectly assumed that the Commission had no duty to determine the factors that constitute such dilution.

I. THE COURT BELOW ERRED IN DISMISSING APPELLANTS' CLAIMS BY DRAWING INFERENCES CONTRARY TO LAW AND UNCONTESTED EVIDENCE THAT HISPANICS' VOTING STRENGTH WAS INTENTIONALLY DILUTED TO DENY THEM A STATE ASSEMBLY DISTRICT IN WHICH THEY CONSTITUTED THE MAJORITY OF THE POPULATION.

Hispanics could have constituted a majority of the population in a Pennsylvania State Assembly district, in the city of Philadelphia, for the first time in the history of the Commonwealth. Past discrimination could not be shown, because they only recently had concentrated in significant numbers. But the totality of circumstances including adoption of a reapportionment plan seemingly conceived to dilute their voting strength provides basis for a claim on which relief can be based. *Lodge v. Buxton,* 639 F.2d 1358 (5th Cir. 1981) *aff'd sub. nom. Rogers v. Lodge,* S.Ct. 80-2100, __ U.S. __ (July 1, 1982).

Here a political party devised a strategy to diffuse the Hispanic population in the creation of a preliminary plan for the Commonwealth Assembly without provision for the adoption of a final plan to encompass an Assembly district in which Hispanics constituted a majority of the population. Party and Commission members knew such a district could be created in accordance with constitutional requirements. Why the Commission did not adopt such a plan admittedly is not known, but

> [t]he discriminatory acts of public officials enjoy a symbiotic relationship with those of the private sector. The situation is not susceptible to isolated remedy.

Lodge v. Buxton, supra, at 1381.

It was uncontested at the trial below that during public hearings for consideration of modification of a preliminary plan (hereafter Preliminary Plan) (A-164), the AFL-CIO submitted a proposal for legislative reapportionment of Assembly seats in the City of Philadelphia (hereafter AFL-CIO Plan) (A-163). Unlike the Democrats who did not suggest a district in Philadelphia with a Hispanic population greater than 15%, the AFL-CIO Plan contained one, the 180th Assembly District, with at least 54 per cent Hispanic population.

The Commission then adopted a final plan in which the 180th Assembly District included little more than 40 per cent Hispanic population; the majority of the population is white (hereafter Final Plan) (A-165). No other district had a population encompassing a greater percentage of Hispanics. On the face of the Final Plan, Hispanics had been fenced out of the one Assembly district in which they could have constituted a majority of the population.

Philadelphia City Committee Chairperson David Glancey, an attorney, testified that the Commission took into account his data for "various ethnic populations, district by district, in the city" of Philadelphia (A-98). The court below found that some of these suggestions were incorporated in the Preliminary Plan (A-7).

Those population numbers were submitted by Glancey through O'Donnell (A-112). That legislator claimed he was acting for both the political party and for a Commission

member at the time he received those suggestions (A-113), but that in his judgment he always acted in a legislative capacity (A-109).

The meaning of those population numbers, their application to Hispanics, and their acceptance by the Commission were explained in a remarkable television interview of Glancey. In that television interview admitted into evidence in its entirety (A-87), Glancey stated:

a. The Democratic City Committee was very influential in the process of formulation of the Preliminary Plan (A-154);

b. The Committee did consult with the Commission during the formulation of the Preliminary Plan, through O'Donnell (A-155);

c. The Committee's strategy diffused the (Hispanic) population (A-156);

d. The Committee left out the Hispanic community on purpose in the Preliminary Plan (A-157);

e. The Final Plan included a population consisting of 40.1 per cent Hispanic, six per cent black, and the remainder white in the 180th Assembly District (A-154, 158);

f. The Committee knew the Preliminary Plan would not meet constitutional requirements; Glancey himself saw no reason to provide a district with an Hispanic population greater than 40 per cent (A-157, 158).

The Court below failed to draw any material findings of fact from the transcript or from two of the witnesses. One of these witnesses, a state legislator, who like Glancey and O'Donnell is an attorney, testified for Appellants that Commission member James Mandarino said that the Commission would try to follow the Democratic City Committee's plan (A-81). (Mandarino was the Commission member for whom O'Donnell said he acted.) The witness testified the Commission made only two modifications before presenting the Final Plan, one of them affecting the Hispanic population in the 180th (A81-82), after it promulgated the Preliminary Plan.

Uncontested evidence from the other witness, also an attorney, revealed that, between submissions intended for the Preliminary and Final Plans, Commission Chairman Freedman said he saw no need to form a district with an Hispanic majority (A-67). Freedman was reported to have said the Final Plan would reflect the judgment that no Assembly district for Philadelphia would encompass an Hispanic majority (A-67).

The Commission surely could have considered an Assembly district that would "fairly reflect the strength" of a minority community. *City of Richmond v. United States*, 422 U.S. 358, 370-71 (1975). The only testimony submitted on this issue was that the Commission chairman saw no need to take into account that Hispanics could constitute a majority of a district.

A plurality of this Court has suggested what a state should take into account and regard as a majority in its reapportionment considerations pursuant to Section 5 of the Voting Rights Act of 1965. Speaking through Justice White in *United Jewish Organizations v. Carey*, 430 U.S. 144, 162, (1977), the plurality stated:

> [N]either the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment. Nor is petitioners' second argument valid. The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment.
>
> Moreover, in the process of drawing black majority districts in order to comply with Section 5, the State must decide how substantial those majorities must be in order to satisfy the Voting Rights Act. The figure used in drawing the Beer plan, for example, was 54% of registered voters.
>
> At a minimum and by definition, a 'black majority district' must be more than 50% black. But whatever the specific percentage, the State will inevitably arrive at it as a necessary means to ensure the opportunity for the

> election of a black representative and to obtain approval of its reapportionment plan.'

Id., at 163.

Once it is shown that a reapportionment plan ultimately is traceable to a discriminatory purpose, as it is here to the conception of dilution of Hispanic voting strength in the Democratic Party City Committee strategy and the unexplained action of the Commission in its Preliminary Plan mimicking the Committee's strategy and in its Final Plan,

> '[t]he burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures'

produced the undesired result. *Washington v. Davis,* 426 U.S. 229, 241 (1976).

In this case, the court below never determined if or when the burden should shift to the Commonwealth or the Commission to provide a valid reason for a Final Plan for the Assembly without a district in which Hispanics could have been in the majority, when such an alternative was available.

What must be shown, and by whom, when a minority group, such as Hispanics herein, claims that its voting strength was diluted as part of a plan "conceived or operated (as a) purposeful devic(e) to further racial . . . discrimination"? *Mobile v. Bolden,* 446 U.S. 55, 70 (1980) quoting from *Whitcomb v. Chavis,* 403 U.S. 124,149 (1971).

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9 In *United Jewish Organizations v. Carey, supra,* Justice White discussed the relationship between the number of registered voters in a district as compared to the general population. He noted that it might be necessary to assure a population higher than 50 per cent to gain the requisite minimum of registered voters. "The inquiry under Section 5 focuses ultimately on the 'position of racial minorities with respect to their effective exercise of the electoral franchise.' *Id.*, at 164. See also page 163, note 22, which explains that at least for Section 5 scrutiny by the Justice Department the requisite minority voting strength on the basis of population necessarily would have to be more than 50 per cent.

It is suggested here that a court examining a claim under Section 2 of the Voting Rights Act has a duty similar to that of the United States Department of Justice under Section 5 to consider whether minority voting strength has been diluted as alleged.

Without a finding that the unexplained rejection by a legislative body of an election district in which an ethnic group can constitute a majority of the population, that is, more than 50 per cent constitutes a "bottom line" for determining racial impact, a court has no guidance at present to decide whether there has been dilution of minority voting strength in violation of Section 2 and the United States Constitution. In a case like this in which no history exists to demonstrate discriminatory purpose, no method appears sufficient to show that a legislative body engaged in reapportionment "was either motivated by racial considerations or in fact drew the districts on racial lines." *Wright v. Rockefeller,* 376 U.S. 52,56 (1964).

That does not appear to be the intended result of decisions of this Court in cases in which it has been found that minorities must show such motivation. *Washington v. Davis, supra,* 426 U.S. at 239. Courts necessarily must examine various circumstances so that they can infer "from the totality of relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another," *Id.* at 242.

The court below here did not determine whether the Final Plan bore more heavily on Hispanics than any other protected or unprotected group. It simply inferred that the Final Plan was produced as a result of a normal political process, (A-16), rather than one poisoned at its conception and finalized in a form that fenced out Hispanics. The court below avoided ruling on what would constitute dilution of minority voting strength but instead inferred that Hispanics actually were seeking proportional representation (A-15,n.7).

Appellants were not and are not seeking proportional representation. They were and are asking for a judicial determination that Hispanic voting strength was diluted in the conception and adoption of a reapportionment plan for the Pennsylvania Assembly:

> The district judge must be mindful of the impact of proposed plans on different racial groups. His duty to avoid both gerrymanders and racial dilution requires that much. The judge must analyze the plan and determine that the probable results are such that minority strength is not diluted. But this legitimate concern with the outcome cannot justify a strict proportionality brought about by manipulation of district lines. If the plan passes the dilution test [citations omitted], race is no longer an important factor.

Marshall v. Edwards, 582 F.2d 927,936 (5th Cir. 1978), *cert. den.* 442 U.S. 909 (1979).

The Final Plan here never was subjected to a dilution test. Instead, the court below ruled that since an Assembly district was provided in which the Hispanic population was increased from 15 per cent to 40 per cent, "[i]t is more reasonable to infer from such a marked upward adjustment that the Commission considered the views of Hispanics and did what it could to accommodate them, than it is to infer that the Commission embraced the views of defendant Glancey. That the Commission failed to provide for a district containing the maximum possible concentration of Hispanic voters does not weaken the argument that the Commission acted properly (A-16)."

While the court below was ruling as if the defendants had presented no evidence, it simply discounted the Appellants' offer of proof by inference. In so doing, the court ignored the kind of examination of the evidence it was required to provide at that stage of the proceedings in accordance with *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

Surely the court below erred when it failed to apply any relevant test for the examination of evidence in a civil rights or voting rights case but instead determined that

> "[r]eapportionment brings into play a variety of competing considerations—ethnic, racial, political, economic and otherwise. Compromise is of the essence of the process. Plaintiffs here have not shown that such competing con-

> siderations did not exist . . . . In the absence of such a showing, the Court cannot conclude that the Commission's failure to create a 56% Hispanic district resulted from purposeful discrimination rather than from necessary accommodation (A-16)."

This Court therefore should assume jurisdiction and reverse that determination with instruction to apply the appropriate standard for judicial review of voting rights claims.

II. LEGISLATIVE PRIVILEGE CANNOT BE APPLIED AS IT WAS HERE TO BAR EVIDENCE NECESSARY FOR A JUDICIAL DETERMINATION IN A VOTING RIGHTS ACTION.

The requisite burden of proof placed upon litigants who seek to prove violations of the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act is beyond dispute. Proof that the legislature is "motivated by racial considerations," *Wright v. Rockefeller*, 376 U.S. 52, 56 (1964), and that the electoral system at issue is "conceived or operated as a purposeful device to further racial discrimination," *Mobile v. Bolden*, 446 U.S. 55,66 (1980) is needed to establish a constitutional violation.

But heretofore insurmountable barriers have not been placed in the way of gathering and presenting the evidence necessary to establish illicit purpose on the basis of all the circumstances surrounding a voting rights action. What is needed is the opportunity for litigants like Appellants to present facts that will permit "a sensitive inquiry [by the trial court] into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). Tolerance must be shown in voting rights cases to proof other than by direct evidence. *Rogers v. Lodge, supra; Mobile v. Bolden, supra.*

Circumstantial evidence of the foreseeability of the discrimination may not be sufficient to establish discriminatory purpose but such proof nevertheless is relevant, *Columbus*

Board of Education v. Penick, 443 U.S. 449 (1979), if it shows that a result complained of occurs because of, rather than in spite of, the invidious intent. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979). Knowledge of the alleged discriminatory harm, *Reed v. Rhodes*, 607 F.2d 714 (6th Cir. 1979) *cert. den.* 445 U.S. 935 (1980), and a choice of a discriminatory option when less discriminatory alternatives are available, *United States v. Board of School Commissioners of Indianapolis*, 573 F.2d 400 (7th Cir. 1978), *cert. denied*, 439 U.S. 824 (1978), likewise should be taken into account for a judicial determination of claims of dilution of minority voting in a case such as the one at the bar.

Not only did the court below ignore such circumstantial evidence here, but it barred Appellants from gathering and presenting germane facts at trial by issuing and enforcing protective orders granting broad use of legislative privilege. (See, e.g., A-122,124).

The use of legislative privilege as a bar to such inquiry has never been specifically addressed by this Court. This Court, however, consistently has held that the privileges and immunities that state legislators and their agents enjoy in federal question cases are developments of federal common law and do not rest on the Speech or Debate Clause in Article I, Section 6 of the United States Constitution, *United States v. Gillock*, 445 U.S. 360 (1980); *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 404 (1979).

The *Gillock* opinion represents this Court's sole full deliberation of an attempt by a state legislator to assert an evidentiary privilege based on his legislative immunity in a federal question case. The case involved the criminal prosecution of a state legislator under federal bribery statutes. Petitioner therein argued that this Court should exclude all evidence concerning his legislative acts pursuant to: Rule 501 of the Federal Rules of Evidence; the history and policy behind the federal Speech or Debate Clause; and principles of comity.

This Court, in an opinion by the Chief Justice, rejected all of these arguments. Stating that Rule 501 specifically permits the development of evidentiary privileges on a case-by-case

basis, this Court noted that the privilege sought was not one of the proposed privileges submitted to Congress by the Advisory Committee of the Judicial Conference. Such an omission, the Chief Justice stated, suggested that "the claimed privilege was not thought to be indelibly ensconced in our common law or an imperative of federalism." *Gillock, supra*, at 367-368 (footnote omitted).

The Chief Justice then dismissed the other contentions. Interpreting case law concerning legislative privilege in light of the "American experience," *id.*, at 369, this Court held that neither the separation of powers justification which supported the Speech or Debate Clause's formulation nor principles of comity provides for an extension of evidentiary privilege to a state legislator in all circumstances.

> . . . (F)ederal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch. Baker v. Carr, 369 U.S. 186, 210, 7 L.Ed.2d 663, 82 S.Ct. 691 (1962). Cf. Dombrowski v. Pfister, 380 U.S. 479, 489, 492, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965) (federal court may enjoin state court application of a clearly unconstitutional statute).

Id., at 370 (footnote omitted).

Regarding the second rationale for the Speech or Debate Clause—the need to preserve legislative independence—the *Gillock* opinion stated that *Tenney v. Brandhove*, 341 U.S. 367 (1951) does not mandate an *evidentiary privilege* for state legislators, at least in a criminal case. Although *Tenney* held that the Civil Rights Act of 1866 did not abrogate the *common law immunity* from a suit for damages that state legislators enjoy, the Chief Justice also relied upon two cases in which this Court accepted the legality of federal interference in state legislative processes, *Bond v. Floyd*, 385 U.S. 116(1966), and *Baker v. Carr*, 369 U.S. 186 (1962).

In light of *Gillock, supra*, the application of the American structure of federalism to the case at the bar is a novel and substantial issue raised by this appeal in a civil action, since

Appellants effectively were precluded by the granting of protective orders from gathering information about the various plans the Commission and its agents actually considered.

III. THE COURT BELOW ERRED IN GRANTING PROTECTIVE ORDERS, BASED ON LEGISLATIVE PRIVILEGE, WHICH PRECLUDED APPELLANTS FROM GAINING INFORMATION TO ESTABLISH DISCRIMINATORY PURPOSE IN THE CREATION AND ADOPTION OF A REAPPORTIONMENT PLAN.

The protective order granted to the chairman of the Commission by the court below placed Appellants in an unwarranted and anomalous position. On the one hand, Appellants were required to present evidence that the reapportionment plan in question was conceived with a discriminatory purpose. On the other, Appellants were barred by order of the single judge below, later affirmed by the three-judge panel, from inquiring because of legislative privilege about factors considered by Commission members in presenting a Preliminary Plan and promulgating a Final Plan that fenced out Hispanics in an Assembly district in Philadelphia. This Court has never ruled in a voting rights case, or any similar action requiring the showing of discriminatory purpose, the extent to which the body engaged in reapportionment can assert legislative privilege to bar inquiry into their actions. *Cf. Brown v. Califano,* 627 F.2d 1221, 1234, n. 78 (D.C. Cir. 1980); *In re Grand Jury Proceedings,* 563 F.2d 577,586-587 (3rd Cir. 1977, Gibbons, j., concurring).

This Court certainly has left a door open to examination before trial of legislators and their agents who are allegedly acting illegally. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268 (1977); see *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 420 (1971). Whether a protective order below was appropriate under these cases is a substantial and novel issue which Appellants ask this Court to consider.

At the time the protective order was granted, Appellants already had offered proof that the Commission Preliminary Plan remarkably resembled in all pertinent respects the Democratic Party City Committee strategy to dilute the minority voting strength of Hispanics. Yet the single judge below ruled that Appellants had not shown that this case involved the extraordinary circumstances that would allow full scope of examination before trial of persons responsible for or involved in reapportionment.

The *Arlington Heights* decision, *supra,* provided important and often cited "subjects of proper inquiry" that Appellants might address to prove that a legislature acted with discriminatory purpose or intent, and thereby violated federal statutory and constitutional protections afforded racial and ethnic groups. One of those subjects was the legislative or administrative history behind the action. *Id.* at 268. Speaking for the *Arlington Heights* majority, Justice Powell noted:

> In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of official action, although even then such testimony frequently will be barred by privilege. See Tenney v. Brandhove, 341 U.S. 367, 95 L.Ed. 1019, 71 S.Ct. 783 (1951); United States v. Nixon, 418 U.S. 683, 705, 41 L.Ed.2d 1039, 94 S.Ct. 3090 (1974); 8 J. Wigmore, Evidence Section 2371 (McNaughton rev. ed. 1961).

Id.

Justice Powell then noted:

> This Court has recognized ever since Fletcher v. Peck, 6 Cranch 87, 130-131, 3 L.Ed. 162 (1981), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decisionmaker on the stand is therefore "usually to be avoided." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420, 28 L.Ed.2d 136, 91 S.Ct. 814 (1971).

Id., at 268, n.18.

The *Arlington Heights* plaintiffs failed to prove that discriminatory purpose was a motivating factor in the Village Board's decision, but this Court noted that they were allowed to depose and examine a Board member at trial:

> Respondents were allowed, both during the discovery phase and at trial, to question Board members fully about materials and information available to them at the time of decision. In light of respondents' repeated insistence that it was effect and not motivation which would make out a constitutional violation, the District Court's action was not improper [to limit other examination at trial].

Id., at 270, n. 20.

As noted, the single judge below here failed to find extraordinary circumstances to warrant inquiry into any matter cloaked by immunity or privilege (A-27,38). That ruling would appear contrary to the *Arlington Heights* decision that:

> When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference [to refrain from reviewing legislative acts] is no longer justified.

Id., at 265-266.

In this case, Appellants already had presented a transcript of the Glancey interview showing that the Democratic Party City Committee decision to deliberately diffuse the Hispanic population in North Central Philadelphia had been transmitted to O'Donnell, one of the individuals claiming legislative privilege because he was working for Commission member James Mandarino. See also, *McMillan v. Escambia County, Fla.*, 638 F.2d 1239,1246, n. 15 (5th Cir. 1981), *cert. dismissed*, U.S., 102 S.Ct. 17 (1981) (circumstances found for inquiry into legislative intent and actions in a voting rights case).

The *Arlington Heights* decision also provides further bases here for Appellants' inquiry at least into the materials that were available to the Commission and its agents to formulate reapportionment plans. *Arlington Heights, supra*, at 270, n. 20. Those materials would have given Appellants an opportu-

nity to gather at least circumstancial evidence in support of their positon that the Preliminary and Final Plans were drawn with racial motivation or along racial lines to fence out Hispanics.

Here such inquiry was foreclosed by the granting of the protective orders. Appellants therefore urge this Court to address the circumstances in which the use of legislative privilege may be limited to permit the obtaining and use of evidence to establish discriminatory purpose in a voting rights case.

IV. A STATE LEGISLATOR IS REQUIRED TO MAKE MORE THAN A GOOD FAITH REPRESENTATION TO CLOAK HIMSELF WITH IMMUNITY IF HE IS TO AVOID DISCLOSURE IN DEPOSITION OR TESTIMONY OF HIS ROLE IN A REAPPORTIONMENT PROCESS ONCE PRIMA FACIE EVIDENCE ESTABLISHES THAT HE ACTED AT LEAST IN PART IN A POLITICAL RATHER THAN LEGISLATIVE CAPACITY.

Both the single judge and the three-judge court were made aware by a television interview transcript provided with the complaint in this action that State Legislator Robert O'Donnell acted in a political capacity during deliberations of a reapportionment plan for the Pennsylvania Assembly (A-9). Yet from the outset, Appellants bore the burden of showing why a protective order should not be granted to cloak O'Donnell with immunity (A-32). The court then ruled that O'Donnell could be questioned "to the extent to which the deposition in good faith would inquire only into . . . (O'Donnell's) activities and functions as a private person, or that are strictly political . . . . " (A-43).

The deposition went aground, however, as did the taking of testimony at trial, because, in O'Donnell's judgment, he was never consulted outside of his legislative capacity about a reapportionment plan (A-109). That assertion was directly contradicted by Democratic City Committee Chairperson David Glancey at trial and in the television interview. Glancey

said he asked O'Donnell to help him with the reapportionment process (A-91) and they worked together with three or four others to put forth a legislative reapportionment plan for Philadelphia (A-155). Glancey provided information to O'Donnell so that "the Commission would know the feelings of the people in Philadelphia, some people in Philadelphia," (A-112); Glancey said O'Donnell was working in both his political and legislative capacities but could not say when O'Donnell was in which role (A-113).

For the first time at trial, O'Donnell revealed that he talked to Glancey (A-119), and to Hispanic attorney Angel Ortiz about a "Spanish district." O'Donnell did not let Ortiz know that he was acting for the Commission at the time (A-120).

At trial Appellants' counsel and the court during O'Donnell's testimony tried to sort out when the state legislator acted in which capacity with mixed success. For example, O'Donnell was allowed to deny a daily newspaper article's characterization of him as the writer of the Commission's reapportionment plan, but he was protected by an objection sustained on the basis of immunity from answering what, if any plans he did draw. (A-122-124).

Such assertions, as that by O'Donnell that he always acted in his legislative capacity during reapportionment considerations, are insufficient to warrant the blocking of deposition and discovery of documents for all relevant information, and a subsequent invocation at trial, at will by that state legislator of an evidentiary privilege of immunity. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268 (1977). Besides, O'Donnell at most was in an "official" not legislative capacity. See *Gravel v. United States*, 408 U.S. 604 (1972).

Although the assertion of state legislative privilege is grounded in federal rather than state law, *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. *supra* at 404, weight should be given by this Court to recent interpretation by the Pennsylvania Supreme Court of the privilege's application *Sweeney v. Tucker*, 375 A.2d 698 (Pa. 1977).

The Pennsylvania Supreme Court noted that the Commonwealth's Constitution contains a Speech or Debate Clause that

essentially is the same as that in Article I, Section 6 of the United States Constitution. See also *Consumers Education and Protective Assn. v. Nolan,* 368 A.2d 675 (Pa. 1977).

The *Sweeney* court then interpreted federal cases to determine whether an expelled state legislator could be barred from seeking back pay by an assertion of legislative immunity against him. The court then ruled such assertion of immunity did not bar all judicial review of legislative acts. *Sweeney v. Tucker, supra,* at 704.

In pertinent part, the Pennsylvania Supreme Court ruled:

> Even where an action against a legislator is barred by the Speech or Debate Clause, legislative employees who participate in unconstitutional activity are responsible for their actions; that the legislative employees are acting pursuant to express orders of the legislature does not bar judicial review of the underlying legislative decision.

Id.

A legislator or someone acting for him only would be protected from inquiry into conduct within the sphere of legitimate activity. *Sweeney v. Tucker, supra,* at 704, n. 16. (Cited are *Gravel v. United States,* 408 U.S. 606, 624 (1972) and *Tenney v. Brandhove,* 341 U.S. 367, 375 (1951).)

At the time the single judge below here determined that a protective order should be granted in part for O'Donnell, the court first should have ascertained and ruled on the parameters for discovery in light of the evidence before it. That court erred by limiting discovery to a "good faith" inquiry of a state legislator who, in his own judgment, always acted in a legitimate legislative function during reapportionment consideration, despite evidence to the contrary. It was for the court from the outset, not the legislator, to set the boundaries of the inquiry and the scope of discovery.

CONCLUSION

For all the foregoing reasons, Appellants respectfully request that the Court note probable jurisdiction; and reverse and remand this action with direction to the trial court, or set this case down for full hearing at the earliest possible date.

July 6, 1982

Respectfully submitted,

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CLERK

No. 82-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HISPANIC COALITION ON REAPPORTIONMENT, *et al.*,

Appellants,

—v.—

LEGISLATIVE REAPPORTIONMENT COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APPENDIX TO JURISDICTIONAL STATEMENT

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Order of Three-Judge District Court
Dated April 6, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-0480

HISPANIC COALITION ON REAPPORTIONMENT; ALFRED DELGADO, NITZA SANTIAGO, NAYDA CINTRON, and JULIO OLMEDO, individually and on behalf of all others similarly situated

—v.—

LEGISLATIVE REAPPORTIONMENT COMMISSION; DEMOCRATIC PARTY CITY COMMITTEE OF PHILADELPHIA; DAVID GLANCEY and ROBERT O'DONNELL in their official capacities, WILLIAM R. DAVIS, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, his successor, if any, agents, assignees, and employees

ORDER

AND NOW, TO WIT, this 6th day of April, 1982, for the reasons stated in the foregoing Memorandum, IT IS ORDERED as follows:

1. The motion of defendants David Glancey, Robert O'Donnell, and the Democratic Party City Committee of Philadelphia to be dropped or dismissed as defendants under Fed. R. Civ. P. 21 is *granted*, and said defendants are hereby *dropped* as parties defendant;

2. The motion of defendant Legislative Commission for involuntary dismissal under Fed. R. Civ. P. 41(b) is *granted*, and all claims against defendant Legislative Reapportionment Commission are hereby *dismissed*:

3. The motion of defendant William R. Davis, Secretary of the Commonwealth of Pennsylvania, for involuntary dismissal under Fed. R. Civ. P. 41(b) is *granted*, and all claims against said defendant are hereby *dismissed*.

LOUIS C. BECHTLE
Louis C. Bechtle
U.S.D.J.

LEONARD I. GARTH
Leonard I. Garth
U.S.C.J.

ALFRED L. LUONGO
Alfred L. Luongo
U.S.D.J.

Memorandum Opinion of Three-Judge District Court
Dated April 6, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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HISPANIC COALITION ON REAPPORTIONMENT; ALFRED DELGADO, NITZA SANTIAGO, NAYDA CINTRON, and JULIO OLMEDO, individually and on behalf of all others similarly situated

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Before: April 6, 1982

GARTH, Circuit Judge
LUONGO, District Judge
BECHTLE, District Judge

MEMORANDUM OPINION

BECHTLE, District Judge

The regrettable but inevitable disappointment that follows reapportionment has surfaced again in the case before us.

Challenged are the district boundaries of a single seat in the Pennsylvania House of Representatives. Plaintiffs contend that those boundaries were designed with the purpose and effect of diluting or diffusing the Hispanic vote in a certain area of Philadelphia, in violation of Section 1983 of Title 42, United States Code, and Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Plaintiffs seek a variety of declaratory and injunctive relief. On March 16, 1982, the present Court of three judges, duly convened, held a final hearing on the merits. What follows constitutes the Court's findings of fact and conclusions of law.

I.

Reapportionment of Pennsylvania's state legislature is governed by a provision of the state's constitution requiring that a Legislative Reapportionment Commission be constituted for the purpose of reapportioning the Commonwealth in each year following that in which the federal decennial census is reported. Pa. Const. art. 2, § 17(a). The commission is to consist of five members: the majority and minority leaders of both the state Senate and the state House of Representatives or their designees, and a chairman selected by the first four members in a manner also provided by the state constitution. *Id.* § 17(b). Within ninety days of the certification of the name of the chairman to the Secretary of the Commonwealth, the officer of the Commonwealth who supervises elections, the commission must file a preliminary reapportionment plan. Within the next thirty days, the commission may make corrections and "[a]ny person aggrieved by the preliminary plan" may file exceptions to the plan. If exceptions are filed, the commission has another thirty days from the date of the filing of the exceptions to prepare and file a revised reapportionment plan with the Secretary of the Commonwealth. *Id.* § 17(c).

With the filing of a revised or final reapportionment plan, the principal work of the commission is finished. A person aggrieved by the final plan, however, may file an appeal directly to the Supreme Court of Pennsylvania within thirty

days of the filing of the plan. If shown to be contrary to law, the plan may be remanded by the Supreme Court to the commission for correction. *Id.* § 17(d). If, however, the Supreme Court decides that the plan is not contrary to law, or if no appeal is taken, then the reapportionment plan "shall have the force of law and the districts therein provided shall be used thereafter in elections to the [Pennsylvania legislature] until the next reapportionment as required under this section . . . ." *Id.* § 17(e).

The 1980 United States Census reported that Pennsylvania had a population of 11,866,728. *In re Reapportionment Plan for the Pennsylvania General Assembly*, No. 331 *et seq.*, slip op. at 7 n.5 (Pa. December 29, 1981). Thus, each of Pennsylvania's 203 seats in the state House of Representatives, including the 29 seats allocable to the City of Philadelphia, would ideally represent 58,456 people. *Id.* at 7. The United States Census also reported that the Hispanic population of Philadelphia increased from approximately 25,000 in 1970 to approximately 63,000 in 1980. Amended Complaint ¶¶ 19-20. Most of these 63,000 Hispanics live in the north central area of Philadelphia focused upon in this case. *Id.* ¶ 22.

In conformity with the requirements outlined above, defendant Legislative Reapportionment Commission ("Commission") was duly constituted in January and February of 1981. It consists of Senator Robert C. Jubelirer, Senate Majority Leader, Senator Edward P. Zemprelli, Senate Minority Leader, Representative Samuel E. Hayes, House Majority Leader, Representative James J. Manderino, House Democratic Whip, and the Chairman, selected by them, James O. Freedman, Dean of the University of Pennsylvania School of Law. Once formed, the Commission began its initial task of preparing a preliminary reapportionment plan. Public comment from interested citizens was sought at this stage as it often was throughout the process. *See* Chronology of the 1981 Pennsylvania Reapportionment Plan, Document No. 10, at 2, 3 [hereinafter cited as "Chronology"].

By the time the preliminary reapportionment plan was being prepared, defendant Democratic Party City Committee of

Philadelphia ("City Committee") and defendant David Glancey, Chairman of defendant City Committee, had developed a number of suggestions on how to reapportion the City of Philadelphia which they sought to have included in the preliminary reapportionment plan. N.T. 53-54. These suggestions did not take the form of a comprehensive proposal having defined district boundaries with a supporting analysis of the size and composition of the populations in each district. Indeed, the closest the City Committee came to formulating a "plan" was to develop worksheets grouping wards and divisions preferably to be included within the same legislative district. N.T. 53-54.

Defendants Glancey and the City Committee knew, however, that the districts so proposed would split the vote of the Hispanic community among several districts and would leave little opportunity for the election of an Hispanic representative. Nevertheless, the objective of so distributing the Hispanic vote was not to cause the adoption of a final reapportionment plan in which the Hispanic vote was diffused. On the contrary, defendants hoped that the filing of a preliminary plan splintering the Hispanic vote would provoke a strong reaction from that community. The resulting outcry, it was hoped, would cause the Commission to adjust district boundaries in order to form a district with a larger Hispanic population. In a kind of domino effect, the adjustment of boundaries to form a district of greater Hispanic concentration would require corresponding adjustments in neighboring districts. It was hoped that among the districts redrawn would be those in an area of the city where the Democratic Party was doing battle with the Republican Party, and that the adjustments in those districts would result in districts drawn more favorably for the Democratic Party. N.T. 61-63; Exhibit P4 at 19-20.

The suggestions of the City Committee and defendant Glancey that embodied this strategy were never submitted directly to the Commission or any of its individual members, either formally or informally. N.T. 48, 56. Instead, defendant Glancey transmitted them verbally to defendant O'Donnell, who had been asked by Commission member James J. Manderino "to communicate . . . the views of folks in Philadelphia and

also information, technical and otherwise, about what the impact of the reapportionment plan would be." N.T. 46, 58 & 75. Prior to the filing of the preliminary plan, however, defendants Glancey and O'Donnell never discussed the specific question whether an Hispanic district ought to be created. N.T. 90. Moreover, neither defendant Glancey nor defendant City Committee was shown to have played any other part in the development of the Commission's preliminary reapportionment plan. *See* N.T. 43, 48-49, 66-67.

On August 20, 1981, the Commission filed its preliminary reapportionment plan. Exhibit P5. While many aspects of the preliminary plan provoked comment, the only aspect of importance here is that none of the proposed districts for the state House of Representatives had a population that was more than 15% Hispanic. Furthermore, while some of the City Committee's informally transmitted suggestions were incorporated in the preliminary plan, others were not. N.T. 46.

Over the next thirty days, the commission received approximately 300 exceptions to the preliminary plan. On September 24, 1981, the Commission held one of twelve public hearings it conducted on the reapportionment plan, and sixty-four interested citizens testified in support of their exceptions. Among those who filed exceptions and presented supporting testimony at the September 24, 1981 hearing were Angel Ortiz, counsel for plaintiffs in this case, and Wilfredo Rojas. *See* Chronology, Exhibit A. Mr. Ortiz and Mr. Rojas testified that the preliminary reapportionment plan failed to include a district in the House of Representatives that would permit Hispanics an opportunity to elect a representative, even though the increased number and concentration of Hispanics in north central Philadelphia would make such a district possible. *Id.* Also offered at that hearing was the testimony of James Mahoney, a co-ordinator of the Philadelphia Council of the AFL-CIO, who spoke in support of an alternative reapportionment plan for the City of Philadelphia that was prepared by the AFL-CIO. *See* Exhibits P1, P3. Included in that plan was a proposed district for the House of Representatives, the 180th legislative

district, in which Hispanics would constitute about 54% of the population. N.T. at 29-30.

Eventually, on October 13, 1981, the Commission filed a final reapportionment plan that contained many changes apparently made in response to the various exceptions filed. *See* Exhibit P6. Among the boundaries readjusted were those of district 180. As a result, the district as defined in the Commission's revised plan would have a population that was about 40% Hispanic. N.T. at 9; Complaint ¶ 31.

This final reapportionment plan was challenged in twenty-nine petitions for review filed with the Supreme Court of Pennsylvania within the time allowed. One of these petitions for review was filed by several persons of Hispanic origin, including Wilfredo P. Rojas and Angel Ortiz, and two Hispanic organizations. *See* Chronology, Exhibit B. In that petition for review, appellants asserted that the final reapportionment plan unconstitutionally diluted the Hispanic vote in the vicinity of the proposed 180th legislative district. Appellants also filed a brief in support of their petition in which they requested an evidentiary hearing to permit appellants to present further evidence of racial discrimination. Chronology, Exhibit D.[1] Appellants' request for an evidentiary hearing was not granted, and oral argument on twenty-five of the petitions for review was held before that court on December 7, 1981. On December 29, 1981, the Supreme Court filed an opinion approving the plan and declaring it to have the force of law. *In re Reapportionment Plan for the Pennsylvania General Assembly, supra.* The ten applications for reargument, which included an application filed by the Hispanic appellants just mentioned, were

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1 The brief filed in support of the petition for review proposed an alternative reapportionment plan for north central Philadelphia, which has been referred to throughout this litigation as the "Sanchez Plan." *See* Chronology, Exhibit D; Complaint, Appendix ("Plan 4"). The Sanchez Plan proposed the creation of a legislative district with a population 58% Hispanic. This alternative plan, however, had never been submitted to the Commission. Perhaps for that reason, plaintiffs did not offer this plan in evidence at the final hearing. Instead, the testimony and arguments at the final hearing reflected a demand by plaintiffs for a 56% Hispanic district. *See, e.g.*, N.T. 90-91.

denied. No appeal to the United States Supreme Court was taken.

On December 15, 1981, between the date oral argument was heard by the Pennsylvania Supreme Court and the date their decision was rendered, the event primarily responsible for this lawsuit occurred. Mr. Ortiz, counsel for plaintiffs here, conducted an interview, taped for television, of defendant Glancey. During that interview, defendant Glancey made a series of statements suggesting that the defendant City Committee had been very influential with defendant Commission in the process that led to the creation of the preliminary plan. Exhibit P4 at 14-15, 18-19. He then suggested that the "plan" thus submitted by defendant City Committee had been intentionally designed to split the Hispanic vote in north central Philadelphia. *Id.* at 19-22. As an explanation, defendant Glancey declared that City Committee's purpose in doing so was to provoke an outcry from the Hispanic community that would cause the Commission to make changes resulting in a final plan favorable to the Democratic Party. *Id.* at 18-19. Reference to this interview was absent from the briefs submitted to the Pennsylvania Supreme Court on behalf of the Hispanic appellants challenging the final plan, presumably because the brief was filed before the interview took place. *See* Chronology, Exhibit D. The interview *was* mentioned, albeit in a single sentence, in the Hispanic appellants' application for reargument, *see id.*, Exhibit F at 4, but that application was denied.

The present litigation was then commenced. Plaintiffs are four individual Hispanic voters who reside in north central Philadelphia, and an unincorporated association formed for the purpose of protecting the interests of Hispanic voters in reapportionment. Orginally named as defendants were the Legislative Reapportionment Commission, the Democratic Party City Committee of Philadelphia, David Glancey and Robert O'Donnell. In a subsequent amendment to the complaint, plaintiffs added as a defendant the Secretary of the Commonwealth of Pennsylvania, William R. Davis, who is ultimately responsible for the supervision of elections in Pennsylvania. In their complaint, as amended, plaintiffs allege that

the final reapportionment plan was designed with the purpose and effect of diluting or diffusing the Hispanic vote of north central Philadelphia in violation of both 42 U.S.C. § 1983 and § 2 of the Voting Rights Act, 42 U.S.C. § 1973.

The centerpiece of plaintiffs' claims is the Glancey interview, and a transcript of that interview was attached to the original complaint. To reinforce the effect of defendant Glancey's remarks, plaintiffs attached to the complaint affidavits of persons swearing that they heard defendant Glancey make statements suggestive of intentional discrimination against Hispanics in the creation of the reapportionment plan. Finally, plaintiffs also attached copies of newspaper articles suggesting that the preliminary plan was the work of defendants Glancey, O'Donnell and the City Committee, and discriminated against Hispanics.

Soon after the suit was filed, a three-judge court was convened pursuant to 28 U.S.C. § 2284 which provides for the convening of a three-judge court "when an action is filed challenging the constitutionality of . . . the apportionment of any statewide legislative body." *Id.* § 2284(a). A motion for a temporary restraining order filed by plaintiffs was denied shortly thereafter, and an expedited schedule for briefing and a hearing on plaintiffs' motion for a preliminary injunction was established. On March 16, 1982, the matter finally came before the three-judge court for the hearing on plaintiffs' motion for a preliminary injunction. Since no evidence was to be offered other than what the parties intended to produce at that hearing, however, the hearing was treated, with the consent of all parties, as the final hearing on the merits. N.T. 16-17. At the hearing, plaintiffs called five witnesses and a defendant produced one.[2] Having already set forth in narrative form the Court's findings of fact, the Court now turns to a discussion of the issues to be resolved in reaching its decision.

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2 Prior to trial, the deposition which plaintiffs sought of Dean James O. Freedman, Chairman of the Legislative Reapportionment Commission, was made subject to a protective order by reason of legislative immunity. *See* Rulings on Motions for Protective Orders, Document No. 23.

II.

Defendants have raised a variety of defenses which, if sustained, would obviate the need for a ruling on the merits of plaintiffs' claims.[3] With one exception, however, the Court will not decide the issues presented by the assertion of those defenses. While many of these defenses might ordinarily and logically be decided first, the weakness of plaintiffs' case on the merits makes resolution of the often difficult issues presented by the defenses both wasteful and unwise.[4]

One defense does merit resolution. On February 19, 1982, defendants Glancey, O'Donnell and City Committee filed a motion to dismiss them as defendants.[5] The argument made in

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3 In summary, the defenses asserted by defendant Commission are as follows: (1) lack of capacity to be sued resulting from the assertedly automatic dissolution of the Commission following Pennsylvania Supreme Court approval of the final plan; (2) legislative immunity under *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980); and (3) the bar of res judicata arising from the decision of the Supreme Court of Pennsylvania approving the final plan. In addition to the defense discussed in the text, the defenses asserted by defendants Glancey, O'Donnell and City Committee include, first, a claim that plaintiffs' claims are barred because the evidence of intentional discrimination is not newly discovered, and second, collateral estoppel. Finally, defendant Secretary of the Commonwealth asserted the defense of laches.

4 Defendant Commission specifically requested that the Court rule on its defense of legislative immunity under *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980). It is true, as the Commission argues, that such a course, if it led to a decision in the Commission's favor, might obviate the threat that future commissions would be subjected to the burdens of litigation. Nevertheless, where, as here, the case on the merits is weak, such a technical defense is less important to the litigation and receives less of the attention of the parties in briefing and argument. Consequently, the Court loses much of the same quality that is sought by requiring standing: "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Accordingly, the Court declines to decide the issue of the Commission's immunity.

5 The Court denied the motion at the March 4, 1982 pretrial conference without prejudice to the right of defendants to raise the issue

support of this motion, simply stated, is that defendants Glancey, O'Donnell and City Committee do not play any part in Pennsylvania's reapportionment and election process, and thus have no power to provide plaintiffs with any relief. Since analysis of the relief requested demonstrates the validity of this argument, the motion will be granted.

In their original complaint, plaintiffs sought three principal items on relief: 1) a declaratory judgment that the reapportionment plan adopted for the Pennsylvania State Legislature violates federal constitutional and statutory law in diluting the voting strength of Hispanics in Philadelphia; 2) preliminary and permanent injunctions against all steps taken under the plan that would permit the selection and election of candidates; and 3) an order directing the adoption of a reapportionment plan free of the alleged constitutional and statutory defects. Plaintiffs sought no monetary damages. In the amended complaint, filed after it became apparent that the defense now at issue would be raised, plaintiffs added a request for an order "[e]njoining preliminarily and permanently [defendants Glancey, O'Donnell and City Committee] from having special status in the process established . . . for the creation of a constitutionally permissible plan." Amended Complaint, Prayer for Relief ¶ 4b.

None of the items of relief requested makes the joinder of defendants Glancey, O'Donnell and City Committee either necessary or proper. The declaratory relief sought, of course, requires no action on any defendant's part. An injunction affecting the process leading to Pennsylvania's primary elections could not conceivably run against these three defendants simply because they have no official duties or functions under the Pennsylvania Election Code, Pa. Stat. Ann. tit. 25, § 2600 *et seq.*, and thus could not do anything to affect the manner or timing of that process. Similarly, defendants Glancey,

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again at a later stage of the proceedings. The defendants above named accordingly raised the arguments when the Court entertained all defendants' motions for involuntary dismissal under Fed. R. Civ. P. 41(b).

O'Donnell and City Committee do not occupy any position empowered by Pennsylvania law to control in any way the development of a final reapportionment plan for the state legislature. Finally, even if it had been shown that these three defendants did informally possess some "special status" that allowed them *de facto* to exert control over the development of the final plan—and such a showing was not made here—joinder would still be unnecessary: if the Court were to find it necessary to order the state to develop a new reapportionment plan free of constitutional and statutory defects, Pennsylvania would have to produce a plan meeting those criteria; if the plan thereafter submitted met those criteria, it would be of no moment that any of the three defendants participated in its creation. Under such circumstances, where certain defendants are clearly without authority or power to effect any of the relief sought by the plaintiffs, a motion to drop those defendants may properly be granted. *Committee For Public Education & Religious Liberty v. Rockefeller,* 322 F.Supp. 678, 685-686 (S.D. N.Y. 1971); *Rakes v. Coleman,* 318 F.Supp. 181, 192-193 (E.D. Va. 1970); 7 C. Wright & A. Miller, Federal Practice and Procedure § 1683, at 322-323 (1972). The Court will so order.

III.

We turn now to the merits of plaintiffs' claims considered in light of the remaining defendants' motion for involuntary dismissal under Fed. R. Civ. P. 41(b).[6] Under rule 41(b), any of a plaintiff's claims may be dismissed at the close of plaintiffs'

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[6] Defendants' motions under rule 41(b) were timely made at the close of plaintiffs' case. Because the Court deemed it beneficial, in light of the urgency of the matter, to conclude the hearing at a single sitting, and because the only evidence to be presented by any defendant was the brief testimony of a single witness, the court chose not to hear argument on defendants' rule 41(b) motions until the close of all the evidence. The Court explicitly ruled, however, that defendants' motions would not be prejudiced by the Court's decision to hear defendants' evidence first. N.T. 100-102. Accordingly, we may properly rule on defendants' motions for involuntary dismissal as though no evidence had been offered by any defendant.

case if "upon the facts and the law the plaintiff has shown no right to relief." In deciding whether the facts set forth above entitle the plaintiffs before us to the relief they seek, we must first briefly review the applicable law.

Courts, in reviewing reapportionment plans, first focused on inequities caused by states' failures to adjust boundaries of voting districts to accommodate shifts in the distribution of the states' respective populations. *See*, e.g., *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Wells v. Rockefeller*, 394 U.S. 542 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964). It is now well established, however, that a reapportionment plan describing districts of substantially equal population may still be invalid if "conceived or operated as purposeful devices to further racial or economic discrimination." *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971). In *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Supreme Court stated this principle in the following terms:

> State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment. A districting statute otherwise acceptable, may be invalid because it fences out a racial group so as to deprive them of their pre-existing municipal vote. Gomillion v. Lightfoot, 364 U.S. 339 (1960). A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed "to minimize or cancel out the voting strength of racial or political elements of the voting population." Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

Gaffney v. Cummings, supra, at 751. To succeed on a claim based on the principle that a reapportionment plan is invalid despite the substantial equality of population among the districts, it is not enough to show merely that the *effect* of the reapportionment plan is to fence out, dilute or diffuse the vote of a racial or ethnic group. On the contrary, in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), it was clearly the position of at least five of the justices of the Supreme Court that to prevail under either § 2 of the Voting Rights Act or the Equal Protec-

tion Clause of the Fourteenth Amendment, plaintiffs must demonstrate that the reapportionment plan was designed *purposefully* to minimize or cancel out the voting potential of racial or ethnic minorities. *City of Mobile v. Bolden, supra*, at 60-62, 66-67 (plurality opinion of Stewart, Jr.); *id.* at 94-95 (White, J., dissenting). *See also Whitcomb v. Chavis, supra*, at 149.[7]

In the case before us, the only evidence of conduct remotely suggesting intentional discrimination against Hispanic voters is the series of statements made by defendant Glancey in the television interview. There he stated that he had made suggestions for incorporation in the *preliminary* plan that would have resulted in districts which diffused the Hispanic vote. *See* Exhibit P4 at 19-21. Defendant Glancey, however, had no power to control the design of either the preliminary or final reapportionment plan, for under Pennsylvania law, that power resides exclusively with the Legislative Reapportionment Commission. Thus, to prevail on the merits, plaintiffs do not make out their case by simply stating that Glancey held the views that the plaintiffs complain of, or that he communicated them to persons who communicated them to the Commission, or that he personally spoke of them to a Commission staff member or a member of the Commission itself. Rather, plaintiffs must point to *some* evidence that the intent of Glancey was shared or adopted by the Commission, not only in the development of the preliminary plan but in the development of the final plan as well. The record is barren of any such evidence.

Plaintiffs urge the Court to bridge the gap in the evidence of intent by drawing an inference from the circumstances shown. First, plaintiffs point out that defendant Glancey did offer suggestions to the Commission with the purpose of having produced a preliminary plan that fractured the Hispanic vote.

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[7] No federal constitutional right exists which guarantees racial or ethnic minorities proportional representation by members of their own groups. *See City of Mobile v. Bolden, supra*, at 75-80 (plurality opinion), *id.* at 86-92 (Stevens, J., concurring). *See also Whitcomb v. Chavis, supra*, at 156-160.

Plantiffs further note that the preliminary plan filed did break up the Hispanic vote so that no district had a population that was more than 15% Hispanic. Plaintiffs then argue that since the Commission thereafter was shown that a district with a 56% Hispanic population *could* be created, but nevertheless filed a final plan wherein no district contained more than a 40% Hispanic population, the Commission must have intentionally discriminated against Hispanics in response to Glancey's preferences.

Plaintiffs' argument cannot survive even the most cursory examination. Whatever the Commission's reasons for drawing a preliminary plan, without a district of more than 15% Hispanic population, there remains the unalterable truth that the Commission revised that plan to provide for a district with a significantly greater proportion of Hispanic voters equal to 40% of the district's population. It is more reasonable to infer from such a marked upward adjustment that the Commission considered the views of Hispanics and did what it could to accommodate them, than it is to infer that the Commission embraced the views of defendant Glancey. That the Commission failed to provide for a district containing the maximum possible concentration of Hispanic voters does not weaken the inference that the Commission acted properly. Reapportionment brings into play a variety of competing considerations—ethnic, racial, political, economic and otherwise. Compromise is of the essence of the process. Plaintiffs here have not shown that such competing considerations did not exist and cause the Commission to create a district with less than the maximum possible Hispanic population. In the absence of such a showing, the Court cannot conclude that the Commission's failure to create a 56% Hispanic district resulted from purposeful discrimination rather than from necessary accommodation. Accordingly, the motions of defendant Commission and defendant William R. Davis for involuntary dismissal must be granted.

One more point, however, needs to be addressed. Plaintiffs have frequently denounced the conduct of defendants Glancey and the City Committee in channelling suggestions to the

Commission that would intentionally minimize Hispanic voting strength in the preliminary reapportionment plan. It is not the business of the Courts to judge either the wisdom, the fairness, or the effectiveness of the political strategy adopted by defendants Glancey and the City Committee. Under our system, the only question properly before the Court in a reapportionment case such as this is whether or not the reapportionment plan adopted is valid under the law in the face of the particular challenge made, as it is in this case. Nevertheless, it must be said that organizations like the City Committee and individuals like defendant Glancey hold the same right held by plaintiffs to communicate their views on reapportionment. Moreover, an individual or organization does not lose its freedom to submit its suggestions just because the suggestions were motivated by considerations which, if shared or adopted by the state, would result in an invalid reapportionment plan. It is the state, or its designated agency, that must guard against the adoption of an unconstitutional plan, and how the state treats suggestions made does not affect a person's right to make them.

IV.

Plaintiffs have endeavored with understandable zeal to obtain a representative in their state's legislature. Defendant Commission heard their position and apparently tried to accommodate those concerns. The plaintiffs' failure to get all they sought is hardly unusual where reapportionment is concerned. As in the ordinary settlement of litigation, the usual mark of success in reapportionment is that no interested group is completely happy with the result.

Plaintiffs' case fails on two grounds. First, plaintiffs have joined three defendants—defendants Glancey, O'Donnell and the City Committee—who are legally incapable of providing any appropriate relief. Moreover, as to the other defendants, plaintiffs have utterly failed to provide the barest trace of evidence to support their claim that defendant Commission designed the legislative districts in Pennsylvania with the *intent*

to discriminate against Hispanic voters. For both reasons, plaintiffs' claims must be dismissed.

An appropriate Order accompanies this Opinion.

LOUIS C. BECHTLE
Louis C. Bechtle
U.S.D.J.

LEONARD I. GARTH
Leonard I. Garth
U.S.C.J.

ALFRED L. LUONGO
Alfred L. Luongo
U.S.D.J.

Rulings of District Court (Bechtle, *J.*) On Motions for Protective Orders Dated March 4, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-0480

HISPANIC COALITION ON REAPPORTIONMENT, et al.,

—v.—

LEGISLATIVE REAPPORTIONMENT COMMISSION, et al.,

Philadelphia, Pa., March 4, 1982

Before HON. LOUIS C. BECHTLE, J.

RULINGS ON MOTIONS FOR PROTECTIVE ORDERS

Present:

ANGEL ORTIZ, ESQ.,
for plaintiffs

THOMAS N. O'NEILL, JR., ESQ.,
for Legislative Reapportionment Commission

ANTOINETTE R. STONE, ESQ.,
for Democratic Party City Committee of Philadelphia, David Glancey, and Robert O'Donnell

The Court: All right. We'll hear some brief argument on the several matters before the court. There are really two motions I think here. We have three really, but one is for leave to take depositions but the time has run.

Mr. Ortiz: That's moot, Your Honor, at this point.

The Court: So to that extent, that brings us to it seems to me the Commission's motion for protective order in regard to Mr. Freedman and also Mr. O'Donnell's motion for protective order.

Mr. Ortiz: Your Honor, regarding the two motions that are before the court—

The Court: Yes.

Mr. Ortiz: —Both motions, I would just like to make the court aware that Community Legal Services has been on strike during the last week, and the mail has not been delivered to our offices, and plus we attorneys have not been permitted to cross the picket lines in terms of our own union.

I just got these two. Well, the motion from the Legislative Commission was mailed, delivered to our offices, late yesterday afternoon and we are just getting it today. And I haven't read the cases that are cited in there. So we would go ahead with the argument, but I would like leave to be able to brief that and answer it.

The Court: No, I am going to hear all arguments right now. We have a lot of pressure in this case. It seems to me you could pick up the telephone and ask these persons, "What are you relying on?" There is about four cases that control these questions. They can be read in an hour or an hour and a half. You know, if we had a couple of years to litigate this thing I would say let's take thirty days and come back but—

Mr. Ortiz: We are not asking for thirty days.

The Court: The relief being sought here by the plaintiffs is extraordinary, and you want to interfere, and you may be entitled to do it. We want to come to grips with it. We are not going to have what I call a preliminary issue on a relatively fundamental point.

The law on this point I think has been reflected in a variety of forms, a variety of state and federal cases. It is an important point.

I might say this: This is not new, because I think this was raised at some other time, this doctrine of legislative privilege or form of immunity. It is not new or a surprise, last week or this morning. So it seems to me if it is that important to get this discovery and it could have been learned and it has been learned that this would be the objection to it that you could have found out the cases.

So I am not saying you are not busy and have a lot of other problems, but I am saying for the record the reasons why I will not permit any further research on this point by the litigants in any manner that will prevent the court from ruling today.

Now, if after you do research you want to file under our local rules a motion for reconsideration, then the court will take up that. But the court will rule today on these motions. We must advance this litigation. I will not have any further delay.

So everyone is trying to work under these time strictures: The parties are; the court is. We have three judges tied up on this case. So we are all burdened with the time strictures. And for that reason, I am going to hear arguments and rule. You will know before you leave this court room what the ruling is.

I will hear from Mr. O'Neill.

Mr. O'Neill: Yes. Thank you, Your Honor. I will try to be very brief because I know Your Honor's habit is to read the briefs in advance of the arguments.

The Court: Yes.

Mr. O'Neill: And I am not going to, of course, go over the same territory.

I would simply say that I think that no principle of law is better established than the principle that a legislator cannot be

required to account for or explain his legislative conduct in any other place.

The history of this principle, if Your Honor please, is summarized in the Supreme Court's decision in the Eastland case, Eastland versus United States Servicemen's Fund, which is cited in our brief. The brief, however, does not lay out the history, and if I could take one minute, I think that history would interest Your Honor. At least it did me when I read it because apparently the principle was first advanced by Sir Thomas Moore unsuccessfully.

It then grew into prominence during the Parliamentary Wars in England and the language that a legislator could not be required to account for his conduct in any other place first appears in print in the English Bill of Rights in 1689. It then appeared in the Articles of Confederation in this country. It appears in the United States Constitution, Article I, Section 6, saying, "Any speech or debate in either house shall not be questioned in any other place." And it is also to be found in similar language in the Constitution of Pennsylvania.

Now, this principle—and I think the cases are mostly Supreme Court of the United States cases cited in our brief—confers absolute immunity in favor of a legislator against legal action, against a very suit, and also against discovery against members of the legislature and their staff where the staff is performing the legislator's function.

The most recent opinion—and I would say it is directly on point, and the point that is now before Your Honor for his consideration—is the Supreme Court's decision in June of 1980, Supreme Court of Virginia versus Consumers' Union, cited in my brief. And in that case, as Your Honor will recall, the Commonwealth of Virginia had delegated its entire legislative authority to the Supreme Court of Virginia over the regulation of lawyers. And the Supreme Court was sued. And reversing a three-judge district court, the Supreme Court of the United States said that simply not only could there be no recovery of attorneys' fees against them under the Civil Rights Act, but the suit should not have been brought against them and couldn't have been brought against them in the first place.

If I may briefly read some language from that opinion which is not quoted in my brief, and that's why I am taking the liberty of doing it, the Supreme Court said: "We have already decided that the speech or debate clause immunizes congressmen from either suits or prospective relief or damage"—citing Eastland. "The purpose of this immunity is to assure that the legislative function may be performed independently, without fear of outside interference. To preserve legislative independence, we have concluded that legislators engaged in the sphere of legitimate legislative activity should be protected not only from the consequence of litigation's results but also from the burden of defending themselves."

"We have also recognized that state legislators enjoy common law immunity from liability for their legislative acts and immunity that is similar in origin and rationale to that accorded congressmen under the speech and debate clause," citing the Tenney versus Brandhove case, which is also cited in our brief. And there is a great deal more language.

The court concludes: "Thus there is little doubt that if the Virginia Legislature had enacted the State Bar Code, and if suit had been brought against the legislature, its committee, or members, for refusing to amend the Code in the wake of our cases indicating that the Code in some respects would be held invalid, the defendants in that suit could successfully have sought dismissal on the grounds of absolute legislative immunity."

And Your Honor will apprehend this argument is going, of course, not only to the motion which Your Honor is deciding today but also to the other motion on which Your Honor has reserved judgment, namely, our motion to dismiss.

Now, if Your Honor please, these cases hold quite clearly, one, that the legislators can't be sued. That necessarily implies that no discovery can be had of them as well.

If further authority were needed for that, in the Eastland case, the Supreme Court's decision in the Eastland case, one of the things that was sought was a deposition of general counsel for the Senate Committee, for the Eastland Committee. And the court below had ordered (The Court of Appeals had

ordered) the district court to frame an order permitting that deposition to go forward in certain respects. And that was reversed by the Supreme Court of the United States, being only a staff member, but following the principle that a staff member engaged on the work of the legislature is entitled to the same privilege.

Finally, it may strike some as anomalous that in a case where the plaintiff is required to prove not merely that a law, the fact of a law, is discriminatory, but that its intent is discriminatory, it might strike someone at first blush as being anomalous that the plaintiffs would then be foreclosed from deposing the legislators as to their intent.

That very point was involved in the Supreme Court's decision in a case that is not cited in my brief, United States versus Johnson, in 1966, which is 383 U.S. at 169. And that was a criminal case against a member of Congress. It was alleged that he had given a speech in the House and had been paid by private interests to make the speech.

And the court held that even though his wrongful intent in making that speech was an element of the prosecution's case in the criminal action, he was absolutely protected by the shield of the legislative privilege.

Therefore, it seems clear, if Your Honor please, that his deposition really should not go forward. And I haven't seen in my research any authority to the contrary or any authority that would lead me to question what I believe I have represented to you, to Your Honor, as being the current state of the law.

Thank you.

The Court: All right, Mr. Ortiz, do you want to argue this one or did you want me to hear the whole argument?

Mr. Ortiz: We can argue this one right now.

The Court: You represent O'Donnell?

Mrs. Stone: Yes, I will, Your Honor.

The Court: Do you want to hear the other argument, or argue this first?

Mr. Ortiz: I would prefer—

The Court: Sure, Let me hear you on this one.

Mr. Ortiz: Hearing Mr. O'Neill's eloquent recitation, I was very much impressed with what he said.

Your Honor, the basic issue is that we have a law that has been promulgated and accepted by the Supreme Court of Pennsylvania, reapportioning the legislative districts of Philadelphia in such a manner as to diffuse and dilute the vote of the Puerto Rican and Hispanic community of the City of Philadelphia.

The body responsible for putting forward that law or for developing that plan is the Legislative Commission, structured according to Article II of the Pennsylvania Constitution.

The Chairman of that Commission was Dean Freedman of the University of Pennsylvania. Dean Freedman (James Freedman) is not a legislator elected by the people of Pennsylvania; he is an appointed person, to chair that Legislative Commission.

And the issue in essence before the court is not whether he himself acted in a discriminatory manner, but whether the way and the process in which the legislative plan for the City of Philadelphia was accomplished affected, and (if it affected), diluted and diffused the voting power of the Puerto Rican and Hispanic community of Philadelphia.

We are not asking for damages in this action. However, the effect of the law, the effect of the plan, has been one in which we claim a discriminatory purpose was involved.

In order to be able to prove that, in deference to how a law usually gets promulgated in the State of Pennsylvania, it first goes to Committee. Then it goes to debate before the House. And there is a record, a legislative history to which people that want to challenge that law can refer. And there are minutes of committee hearings available to people who want to challenge that law. And in this case, no such thing exists.

We have no way in which we can ascertain what deliberations took place within the committee, what factors were considered at that point. We only have basically the statements of some officials from the Democratic City Committee in which they state very clearly that the plan that was developed and implemented for the City of Philadelphia was the plan

developed by Democratic City Committee, that that plan, being a preliminary plan at the beginning, was the plan that the Freedman Commission accepted.

We have their statement on record. However, we do not have the minutes of the deliberations of the Freedman Commission. And we do not have any testimony in any form whatsoever that can guide us to fill those gaps that this court asked us to fill the last time. And we do have some gaps as we admitted to the court at that point.

The trajectory of the plan from the development by Mr. O'Donnell and the Democratic City Committee to the acceptance of that plan by the Freedman Commission is the thing that we are trying to ascertain by asking this court for permission to depose Dean Freedman.

The Legislative Commission is a very limited body, empowered and charged with developing the plan that is going to affect and decide how the legislative districts of this city in the State of Pennsylvania are going to be structured. It affects the way people are going to be represented.

We believe that the rights of the Puerto Rican community have been affected in a very fundamental way by the way this plan has been developed.

The Supreme Court of Pennsylvania, by not allowing any evidentiary hearings to come forward or any evidence to be put on the record, did not give us the type of record that we needed to be able to fill the gaps that are [in] our present complaint.

We maintain as is stated in the Village of Arlington Heights versus Metropolitan Housing Development, 97 Supreme Court 555 (1977): The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of a decision-making body, minutes of its meetings or reports. In some extraordinary instance the members might be called to stand trial, to testify concerning the purpose of the official action.

Mr. Freedman is not on trial here, but what we are challenging is the law. The Commission is not on trial here. What we are challenging is the plan promulgated by that Commission.

And what we are asking at this time is that we be given the opportunity to be able to question Dean Freedman as to the considerations, the deliberations, and the factors that went into the creation of this plan. That should be public property and that is not at this point to be found at any institution in the State.

The Court: If you believe Arlington to apply, what do you contend is the extraordinary circumstance?

Mr. Ortiz: The extraordinary circumstance is that a community of people has been fundamentally affected by a legislative redistricting plan that limits and dilutes their right to elect a representative to the legislature of this state.

The Court: Well, if that's so, can't that be shown without Dean Freedman's deposition?

Mr. Ortiz: In order to develop the discriminatory purpose of the plan and the intent behind that discriminatory purpose, I think we need to have access to certain minutes and the deliberations of the Commission to fill the gaps that go from the statements of David Glancey as chairperson of the Democratic City Committee, of Mr. O'Donnell, to the implementation of the reapportionment plan as was stated to this court prior to this hearing.

We need to be able to question Dean Freedman as to the development and the factors that went into the development of the reapportionment plan.

The Court: Well I think Arlington also told us that even in that circumstance, even if there is a special circumstance—and I don't believe that what you have outlined is the special circumstance envisioned by that case—but even if there is, didn't that case also say that even in such instances that testimony frequently will be barred by the privilege. The privilege doesn't disappear in that setting.

The privilege will go on.

I mean, do you have one case that says an exception to the privilege is need, an exception to this privilege is the need to get the information?

Mr. Ortiz: We need this information.

The Court: I know. Do you have one case that says that this privilege can be barred because of need, like the Fifth Amendment. Although that is a little different, it is the Constitution. It is like saying, "We have to have this defendant tell us where he hid the proceeds of the robbery. Without that, we can't convict him."

Mr. Ortiz: But what we have here that is lacking, Your Honor, is the legislative debate that usually goes into the development of any statute or law. And we do not have a record to guide us along those lines.

The Court: Well, okay, I am saying you don't have that. I am saying you don't have that because either there is none or it is not accessible or whatever. Even given that, I'm not sure that the cases that support this legislative privilege or immunity or protection or legislative function by legislators or their staff—I'm not sure that need is enough to allow this court to say that the Supreme Court ever either held or implied that way.

I know of no case that says that.

Mr. Ortiz: Your Honor, at the moment, what we are claiming is that racially discriminatory activity has taken place. Mr. Dean Freedman is not a legislator; he was appointed to the Commission.

The Court: Well, we will put that to rest now. In this setting he is functioning in a legislative capacity for immunity purposes—there is no question about that—and it clearly is under the authorities, certainly the chairman.

I might say he didn't act alone; he is acting with other legislators. So if there was ever an intertwining of the chairman of this commission who is serving with other legislators to reapportion the legislature, if there is ever a legislative role, this is it it seems to me. I don't think there is any question about that.

Mr. Ortiz: Well, then, plaintiffs wanting to challenge have always had that legislative history that follows any statute. We do not have that at present and that has been barred to us, not by any arguments that have been put forward in terms of privilege.

The minutes and the deliberations of the establishing of the law, that should be made available, the deliberations and the factors considered. That should be made available. At the moment we can only guess at the psychological or emotional intent of the Commission.

The Court: All right. Well, there is no motion before the court to enforce any kind of a subpoena on a request for production of documents. Before me is a motion for protective order in regard to Dean Freedman's appearing to testify.

Now, that might carry with it the concern that he could be called upon to produce records or documents. But the principle is for a protective order in regard to Dean Freedman.

Mr. Ortiz: We will be issuing a subpoena for deposition and the production of certain documents, Your Honor.

The Court: All right. Let me hear the argument in regard to Representative O'Donnell, and then I will hear Mr. Ortiz in that regard.

Mr. O'Neill: Your Honor, may I just clear up one area of concern?

The Court: Yes.

Mr. O'Neill: Mr. Ortiz was not at the first conference in Your Honor's chambers on this matter.

The Court: Yes.

Mr. O'Neill: And I believe I stated then that the only minutes that exist are the minutes of the public meetings of the Commission. They will be made available on request. There is no need for a subpoena.

The Court: Oh, yes.

Mr. O'Neill: There is nothing in them, however, on this subject. I tell you that now. There is the transcripts of testimony before the Commission; they are available. There will be no need for a subpoena as to those.

The Court: Oh, yes, I understood that Mr. Ortiz wasn't concerned with those items because he has been assured that those matters are what I think we called at that time "the records" and would be made available.

Mr. O'Neill: Yes, sir.

The Court: But other notes or minutes and diaries and the like that would reflect informal meetings or caucus-meetings or anything of Commission members was not included in that in my understanding. I don't know if they exist, but apparently, Mr. Ortiz, if such things do exist, would like to have them and see those. I think that's what his concern about documents and papers relates to.

Mr. O'Neill: In order to save time, I think perhaps when Your Honor is deciding this, it is really all the same question. I don't know that much exists, either, But obviously the non-public material would be accorded the same privilege.

Mr. Ortiz: Well, Your Honor, I do believe that a Commission cannot make a decision without having notes and minutes of the meetings in which they sit down to deliberate the lines of a reapportionment plan.

The Court: I am not going to rule in the abstract on a non-existent subpoena. But I will give you some guidance when I am done as to what I would expect to be covered by the court's ruling. And we'll have to see what the subpoena looks like. But if it is those matters, they are public records. There was testimony, Mr. O'Neill stated, or the report itself, the plan itself; they are being voluntarily produced.

But if it has to do with informal notes or minutes or unrecorded, untranscribed documents and papers of the legislative committee, it would fall in the wake of whatever rights the committee members would have or a legislative member would have.

Mr. Ortiz: Well, Your Honor, the hearing that Mr. O'Neill refers to is a meeting in which people came to testify in opposition or in favor of the plan being proposed.

The Court: Yes.

Mr. Ortiz: In those meetings, there was nothing that can be gotten in terms of their own debate within the Commission that goes to the point that we're making in terms of their own deliberation and what factors were considered when drawing those lines.

The Court: All right. Well, all I can say is you will have to articulate with some exactness the documents and papers you

want. And if those documents and papers are governed by the same principles that govern the testimonial privilege, if there is one, then the documents will be governed by the same ruling. And if they are not, they will not be.

So I am not going to speak to something that's not before me. But I do agree that testimonial immunity, if it exists, and what its limits are, will also assist us in determining what the outlines of documentary privilege are as well.

All right. I would like to hear in regard to Representative O'Donnell or Assemblyman O'Donnell, I guess.

Mrs. Stone: Representative.

The Court: "Representative" is all right, sure.

Mrs. Stone: Your Honor, I am not going to attempt to improve upon Mr. O'Neill's argument regarding the significance or the scope of the legislative immunity privilege because I think that most if not all of what he has said applies to Mr. O'Donnell.

I would simply like to point out to the court that Mr. O'Donnell is being sued in his official capacity as a legislator in this action.

Now, although we have argued in our motion to dismiss that the complaint does not state any claim against him, that is, any claim for relief within the meaning of Rule 12, the plaintiffs' intent is clear, that they are naming him as a defendant quite plainly to attack his official acts performed by him in his capacity as a legislator. I think that's very clear in the complaint.

Even though he is not a member, one of the five members of the Commission, I think he must be held to be protected by the privilege if only because of the nature of the allegations against him which are directed at him as a legislator.

Assuming for the sake of argument that he did make a contribution or made suggestions in a substantive fashion to the Commission during the course of its deliberations, even though he certainly had no control over their ultimate decision, I think he is certainly entitled to the same protection enjoyed by Commission staff members as explained by Mr. O'Neill. And I think that's borne out by the cases.

The Court: Well, he is going to have a different role.

Mrs. Stone: I beg your pardon.

The Court: He could have a different role. I am not sure what line of inquiry—I don't know what line of inquiry—the plaintiffs want from Mr. O'Donnell. But if they are seeking some testimony from him regarding a function by him that was other than in his status as a legislator, that is, in his private capacity or I'll call it his political capacity as opposed to legislative capacity, there may be a difference. I won't know until I hear from Mr. Ortiz exactly what he has in mind. But it is going to depend on what the thrust of the discovery is in regard to him.

It is obvious with Dean Freedman that his only role was in the Commission. He had no other post or role. Indeed that post by its terms expired with the completion of his work. So his only role here is as a Commission chairman together with the other members.

I am not sure what Mr. Ortiz has in mind in regard to Mr. O'Donnell's knowledge, I mean, again, depending on what this is, some might be and some might not.

Mrs. Stone: Well, perhaps, Your Honor. I think I heard Mr. Ortiz say today—and he can certainly clarify this—but I believe I heard him say all of Mr. O'Donnell's statements were of record. So perhaps he is not interested in pursuing this any more. But to the extent that Mr. O'Donnell may have had any role in contributing to the Commission, I think that the immunity privilege would certainly be applicable if that's the situation.

The Court: All right. It's plain that Mr. O'Donnell as a legislator is covered by those rulings and decisions and the authorities that support the immunity for a legislator in his legislative capacity. I will have to see from Mr. Ortiz what he has in mind. Let me ask him.

Mrs. Stone: Fine.

The Court: Mr. Ortiz, would you?

Mr. Ortiz: Yes, sir.

The Court: You have outlined what you would like to learn from Dean Freedman.

Mr. Ortiz: In the case of Mr. O'Donnell and Mr. Glancey and the Democratic City Committee, what we are maintaining is—and as Mrs. Stone just referred—that all of the statements are of record. Not all of the statements are of record. However, we do have certain statements from some of the defendants that go to the point that we are trying to prove in our complaint which is the function and role of the Democratic City Committee, the development of the plan that was finally approved by the legislative commission.

There are statements, and what we are talking about is Mr. O'Donnell's political role, not only his legislative role. He functioned within this plan in a political manner. There was wheeling and dealing going on in terms of different districts and different lines. There were seats to be protected, incumbents and others, and those lines then had to be redrawn accordingly so they be protected.

And in that manner and in that process and in that wheeling and dealing that took place in the political arena, certain deals were struck that were antagonistic to the interests of the Puerto Rican community, discriminatory towards the interests of the Puerto Rican community, and the effect of that wheeling and dealing was ultimately to diffuse and dilute the Puerto Rican community.

The Court: It is not helpful for you to refer to this as just wheeling and dealing. I don't know what that means.

Mr. Ortiz: Well, Your Honor—

The Court: Because if a person is wheeling and dealing as a legislator, it is going to be immune.

Mr. Ortiz: It is not a legislator.

The Court: All right. Well—

Mr. Ortiz: I am talking about political—

The Court: You have to tell me what you are interested in in regard to that deposition. What are the subject matters and what are you going to ask him?

Mr. Ortiz: Your Honor, the subject matters are:

His discussion with different legislators within the City of Philadelphia—

The Court: You mean—

Mr. Ortiz: Incumbents.

The Court: —In Harrisburg, on the House floor? You won't get that.

Mr. Ortiz: Not on the House floor, Your Honor.

The Court: I can't tell what you want.

Mr. Ortiz: In the City of Philadelphia, not on the House floor;

The deliberations of the Democratic City Committee as to the factors that went into the development of the plan that they finally submitted and got accepted by the legislative commission;

Any and all communications that went on between Mr. O'Donnell and the legislative commission in his role as a political leader of the Democratic City Committee, not in his role as a legislator.

The Court: Well, now, if you are talking about—are you talking about—

Mr. Ortiz: The agreements.

The Court: Are you talking about documents that went to or documents that came from the commission? There is a difference.

Mr. Ortiz: That went to and from, Your Honor.

The Court: Well, you won't get what came from.

Mr. Ortiz: Well, Your Honor, what we are asking here is to be able to ascertain the process that took place. If there are any documents available that the Democratic City Committee sent into the legislature in some manner and to the legislative commission, we would like to have access to those documents.

The Court: Well, I am interested now in what this range of the deposition of Mr. O'Donnell will be. I am simply saying that the extent to which you will expect to get documents from the commission of things that they have decided and wrote and sent other than as outlined by Mr. O'Neill, I think you're going to be barred by that privilege.

Now, the extent to which Mr. O'Donnell did or said things as a private person or as a political person and not as a legislator could be a different matter.

Mr. Ortiz: We will be seeking those things, Your Honor, those things that Mr. O'Donnell said, those agreements that Mr. O'Donnell made with the incumbents which were made either verbally or non, [sic] or in writing, in this city in order to protect the incumbents' seat. Those agreements we would be seeking from Mr. O'Donnell. Those are political. Those are political deals that have been struck. And those deals we believe adversely affected the rights of the Puerto Rican community.

The Court: Well, let's assume you have all that. What will you do with that? How do you get that into the plan? How do you prove that that resulted in the commission adopting a plan?

Mr. Ortiz: Your Honor, we are maintaining—

The Court: If you do, I am not sure where that leads you.

Mr. Ortiz: We are maintaining the Commission approved the preliminary plan given to it by the Democratic City Committee developed by Mr. O'Donnell and his staff for the Democratic City Committee, that that plan was Constitutionally poisoned, that that plan was unconstitutional on its very face because it went and its effect was to dilute the vote of the Puerto Rican community and that the continued process—

The Court: Let me just stop you there. And I will let you go on in a minute. But if that is so, what do you want discovery for if on its face it violates the Constitution? We are going to take this up later, but it on its face it violates the Constitution, what do you need discovery for, anyway?

Mr. Ortiz: Because we need to establish the connection between Mr. O'Donnell and the legislative commission and that the legislative commission did not act of its own deliberations and of its own findings through the hearing process that they held in Harrisburg, that they acted to indulge, to accommodate, the political party, the Democratic City Committee and Mr. O'Donnell and Mr. Glancey in this instance by approving a plan favorable to the incumbents and to certain Democratic party legislators in the City of Philadelphia and that the plan that was finally approved discriminated against and diluted the voting power of the Puerto Rican community.

The Court: All right.

Mr. Ortiz: And we need to make that connection between the legislative commission and the Democratic City Committee because that is the process that we are talking about.

The legislative commission did not act solely and based only on the testimony that it heard in its official hearings that it held in Harrisburg.

The Court: All right. That's something that remains to be shown and demonstrated. All right. I think I know.

Mrs. Stone: Your Honor, may I make a brief reply to that?

The Court: Yes.

Mrs. Stone: I think that we have got serious relevancy problems here if what the plaintiffs want to obtain has to do with, for example, deals made within the City of Philadelphia or even anything that Mr. O'Donnell said to the Commission.

Their burden is to show discriminatory intent by the Commission, regardless of what Mr. O'Donnell said. What Mr. O'Donnell says to the Commission, that is certainly not relevant to the intent of the Commission, and I fail to see why that's a proper subject of discovery in this case.

Mr. Ortiz: Your Honor, If I may reply to that—

The Court: Can I just ask one thing before you do? When we say "things Mr. O'Donnell said to the Commission," did he appear and testify? Is his testimony of record, do we know?

Mr. O'Neill: I do not think that Mr. O'Donnell did testify, no, Your Honor.

Mr. Ortiz: All right.

The Court: All right.

Mr. Ortiz: He did not testify, Your Honor.

The Court: Mr. Ortiz, do you want to say something?

Mr. Ortiz: Well, Your Honor, it is basically what we are trying to get to: A process was begun, a process that was started and developed by the Democratic City Committee and that the legislative commission then accepted another plan.

The Court: I don't totally agree. You keep continuing to say they adopted the City Committee's plan as a final plan.

Mr. Ortiz: Your Honor—

The Court: Are you saying that?

Mr. Ortiz: Your Honor, they accepted the preliminary plan.

The Court: Well, I am talking about the final plan that became law.

Mr. Ortiz: The final plan that came into law, Your Honor, I think is part of a process that was begun with that preliminary plan.

However, what we are trying to do is make the connection that a plan was begun that was discriminatory from its very inception, that discriminatory intent remained through its final implementation, and that is basically why we need Mr. O'Donnell's testimony and why we need to depose Mr. O'Donnell and perhaps some other functionary. That will be it.

The Court: The only one before me now is Mr. O'Donnell. You know, there might be others but--

Mr. Ortiz: If Your Honor please?

The Court: Yes.

Mr. Ortiz: One last thing: I would like to have an answering memorandum of law on your desk by Monday, an answering memorandum to Mr. O'Neill's memorandum on the privilege question.

The Court: Well, you can file it by Monday. I am going to rule now on these issues, and if you want to file a motion for reconsideration, you may do so. The time for doing that was today. The time strictures here are absolutely oppressive. I am not going to allow one more minute of time.

This is not new. This has been inquired into before. This is not new or different. Everyone knew this was coming. The court knew it was coming because it was touched upon before. So the court despite all its other work began some preliminary research into what are the key cases and the Constitutional provisions. The court can expect no less from counsel.

You can file whatever you want on Monday, but the court is going to rule now. And if there is ground for a motion for reconsideration, we will do so.

I think we have to begin in regard to both these motions for protective orders in regard to Dean Freedman as well as Mr. O'Donnell with the basic premise that is at the heart of the dispute: That it is unquestioned and has been unquestioned for

many, many years as a basic principle that the motive or purpose of a legislature or legislator in adopting legislation may not be inquired into. It's at the heart of the role of the legislature and the legislator.

As early as, in these terms, McCray versus United States, 195 U.S. 27, decided in 1904, that principle has been upheld. And it has been upheld ever since that time in a variety of circumstances.

The leading case or one of the leading cases on point is Tenney versus Brandhove, 341 U.S. 307, a 1951 case. Even though it is thirty years old, it continues to be sound law on this point.

And as early as Fletcher versus Peck in 1810, found in 10 United States 87 was this principle recognized as a basic principle of a legislative type of government that we have.

On a federal and national level as well as the state level, it is a generally sound principle.

There are a variety of reasons, despite the fact that there are, like in most things, indeed in most privileges burdens and there are disadvantages and it does present some difficulties.

Now, Mr. Ortiz is correct that in the recent Village of Arlington Heights case, 429 U.S. 252, I think if this decision is read carefully, the court said with some degree of care and considerable caution that this principle in some extraordinary circumstances might require nevertheless certain members of the legislature to be called to testify or to stand trial concerning the purpose of some official action.

But the court made it quite plain that frankly it will be barred by the privilege.

On the present record, I don't see any such extraordinary circumstances. Even if there was, it could be barred by privilege.

But let's assume that there was for the moment. Then we have to turn to the privilege itself.

The source of the privilege is historic. It comes about as an historic privilege at the threshhold of this country's existence. And it found its way purposefully and with deliberation into the United States Constitution as a basic principle in Article I, Section 6.

Now, obviously that national or federal Constitutional provision does not apply here. This applies clearly only to Senators and Representative in the National Congress; it does not apply to state legislators.

I might also say that most states including Pennsylvania have adopted a very similar privilege in regard to their own legislature. Pennsylvania provides at Article II, Section 15, that there is a privilege for members of the General Assembly. And the language somewhat tracks the national or federal Constitutional language, that members of the house or the houses shall not be questioned in any other place on any matter in respect to which they have debated or spoken in performing in a legislative capacity.

The law is just clear that it is at the heart of our legislative system. And the reasons that have been given are that it is necessary to have an independent legislature, possibly at the price of maybe not the best legislators in every instance, but the price and the value of having an independent legislature, free to do its work, free to know that it will not have to defend what it deliberated upon or what it spoke to in the legislative halls. It is as fundamental in our system as any one of the first ten amendments that we hear so much about.

Now, while we can't look either to the federal Constitution or the state Constitution as such, because the state Constitution cannot be a bar in a federal setting to prevent a federal claim from going forward, the Supreme Court has recognized that there is in regard to such matters a privilege founded upon federal common law.

The Supreme Court of Virginia versus Consumers' Union has told us that as has Tenney versus Brandhove, in such circumstance, such as we have here, where we have a federal civil case with federal rights involved, the federal common law will recognize if not the same, certainly nearly the same, legislator privilege as exists for the benefit of legislators under the Constitution in state matters or under the federal Constitution for members of the federal legislature.

Now, this privilege has even extended in regard to federal criminal prosecutions of state legislators. And while it is clearly

less protective and is not what we are concerned with here, it does fortify the notion that we do have this sort of immunity for the benefit of state legislators, even when we have federal civil or criminal proceedings.

In respect to civil proceedings, I think a fair reading of the cases suggest that the reach of the immunity is the same: That is, a federal civil proceeding on federal common law will have the same reach as the federal Constitutional reach, which is the same as the state Constitutional reach.

So for practical purposes, we are looking to the authorities that the Supreme Court has relied upon in advancing the privilege to protect legislators in respect to their legislative function.

Under these principles, James Freedman as well as Robert O'Donnell have a threshhold claim of the privilege, Mr. Freedman because he is functioning as a chairman of a legislative commission established by the legislature to perform a legislative function, and where indeed he shared responsibility on that panel with other persons in the legislature. He is being asked to speak to matters concerning that stewardship. So it is clear as to Dean Freedman. The authorities have made it clear; the Eastland case and others have made it clear: Legislators act through committees and subcommittees and through aides. And so long as they are fulfilling their duties within the scope of their authority, they have the immunity, when they are performing for legislators in a legislative function, that the legislators would have.

Now, Mr. O'Donnell, however, has a threshhold claim only because he is a legislator. We have to turn in respect to him to see the extent to which the legislative privilege will protect him. And that has to be articulated from the vantage point of deciding the area of inquiry sought as compared to what his function was that was in that area.

The privilege has been applied generally and has been described in many ways. But I think it is fair to say generally that it applies to things generally done in a session of the legislature by one of its members in relation to the business

before that body. And that comes from Kilburn (sic) versus Thompson, an 1880 case found in 103 U.S. 168.

Whether a particular act is covered by the privilege depends on whether it is legislative or political. Language used in a session of the legislature by one of its members in relation to the business before it has never been restricted to being within the legislative hall itself. And as I mentioned earlier, recent cases have extended the legislature to those authorized to act for it, staff members, aides, counsel, and the like, and even on a subcommittee basis, and even in an area that is geographically removed from the House itself.

But still the duty must be legislative. That is, the immunized realm can only be a legislative realm, a legislative function for a legislative purpose as opposed to a legislator performing other matters that the cases have removed from the immunity—activities associated with simply performing political functions or non-legislative matters, aiding constituents, and the like.

United States versus Brewster, a 1972 case, 408 U. S. 501, repeats these principles. And these principles appear to be repeated as the cases move on, depending on the case. But they are essentially the same. They go back to the time when it was decided in order to make a legislature independent, in order to prevent the chilling of the legislative function by fear of having to defend one's motives or actions, that the immunity is strong, the immunity is virtually absolute, provided it is within the realm of legislative duties and functions.

Most of the cases that have been decided by the Supreme Court involve actions brought against the persons seeking to invoke the privilege. That is somewhat different in the present case here: The action is brought against those enforcing the statute. We have a case here against the Secretary of the Commonwealth and against others as opposed to a legislator himself in his legislative function. That is to say, we are considering here the application of the immunity against persons who could be witnesses, who[se] testimony is needed in respect to the expectation that some other body will be ordered to do something or not do something.

What the court has to decide, then, in regard to both of the persons here, that is, Dean Freedman and Mr. O'Donnell, is whether or not the purposes of this immunity will be served or whether they fall clearly within it. If they fall clearly within it, by definition, the purpose would be served.

Dean Freedman seems to fall squarely within the immunity because he is only being asked, as Mr. Ortiz has I think stated with concern and with candor about the motives and the purposes of the ultimate product of the Commission as well as some of the steps that they took. And Mr. Ortiz is concerned and troubled by the development of what he believes are and indeed must ultimately show and prove are grounds to set aside what is now the law of the Commonwealth in regard to the plan.

He would hope to do this logically and understandably by asking Dean Freedman and presumably other members of the Commission, I suppose, what the thought processes were, what the decision-making formula might have been, what, I suppose, the determination of this point was, or what weight was given to that point.

This is clearly within the legislative privilege that will protect a legislator or person acting for a legislator in a legislative role like Dean Freedman from disclosing any matters touching upon that function.

So it would seem as though, for protecting the independence of the legislators and those who work for them, to allow them to carry on their duties without fear of answering for them or defending at a later time against them, such as appearing at a deposition, or such as being a witness, or appearing by compulsion anywhere, the immunity must be extended to Dean Freedman.

The court does not believe there are extraordinary circumstances in regard to Dean Freedman's or the Commission's work. But even if there were, still the court would at this time impose the immunity, even in the face of the extraordinary circumstances that have been described by Mr. Ortiz.

In respect to Mr. O'Donnell—

Well, let me say one more thing; As far as Dean Freedman is concerned, there is another purpose to be served. One of those additional purposes has been determined by the Supreme Court or has been stated by the Supreme Court at least to be the reinforcement of the separate-branch principle of our government, to prevent possibly the unjust interference by one branch into another, and, as the case pointed out, possibly before a hostile Judicial Branch.

So it will serve that purpose as well not to compel the testimony of a witness who might be called upon to answer possible charges relative to that deposition, and then answer questions fully or thoroughly or answer them at all.

As far as Legislator O'Donnell is concerned, in respect to any of his legislative duties, purely legislative duties, he is entitled to the benefit of the immunity as well.

In addition to that, the purpose of again reinforcing the three branches of the government would apply to the extent to which immunity could be extended to Mr. O'Donnell.

There is an additional purpose to be served by this immunity, and that is to allow legislators not to be diverted from their on-going duties and their attention to their legislative duties by being burdened with civil litigation that in some way could be associated with other or previous or on-going duties. That purpose could be served, by immunizing Legislator O'Donnell.

However, to the extent to which what is being sought from Mr. O'Donnell is purely political, having nothing to do with his status as a legislator or his legislative duties, assigned duties in the legislature, to that extent, it would seem he is not entitled to protection; he is not immune. That is to say, to the extent to which the deposition in good faith would inquire only into private, that is, activities and functions as a private person, or that are strictly political, that is, associated with political status, they are not entitled to the benefit of immunity.

But he is entitled to the benefit of the immunity, the extent to which inquiry would be made as to any legislative function or role that he has.

Now, Mr. Ortiz has outlined a series of lines of inquiry regarding Mr. O'Donnell that in some measure appear to be clearly discoverable, but in some measure I am not sure.

For example, the court will not allow inquiry as to any legislative function that Mr. O'Donnell would have, that is, any committee duty in the legislature or any assignments he is fulfilling as a legislator.

But his activities or his contact with or relationship with the City Committee or with other private persons or other even political persons, which contacts were not associated with the fulfillment of a legislative function or duty, that area would appear to be political and subject to discovery under the normal rules, under the normal standards provided for in Federal Rule of Civil Procedure 26.

So I would also say that—(it is not before me but counsel have spoken to it, and time is important here)—the same rulings that I am advancing now would apply to any documents sought. That is to say, any documents of Mr. O'Donnell unconnected or unassociated with his status as a legislator or role as a legislator or legislatively assigned work is as immune from inquiry at his deposition as any question would be.

And the same, of course, for Dean Freedman, other than the extent that the documents are public documents having been rendered public. And Mr. O'Neill has outlined that he is prepared to turn over a variety of documents considered to be the records of the Commission and its work, which was also testimony before it which has been transcribed, and that's available. And there are some other documents mentioned.

But under no circumstances will the court allow inquiry of Mr. Freedman in regard to any unpublished notes of his own or any caucus or committee notes that have not been published and are not required to be published by law, some that have bearing upon the function of the Commission. They would have the benefit of the same immunity.

So Dean Freedman's motion for protective order is granted.

The motion for protective order for Representative O'Donnell is granted in part and denied in part.

I can't forecast how any deposition would go with Legislator O'Donnell. All I can say is the court expects the ruling today to be a guide of areas that are permitted and areas that are not permitted and would expect also a good-faith approach by all counsel in trying to adhere to those limits.

My suggestion in that regard would be for Mr. Ortiz possibly to develop a series of subject matter or questions that he will expect to ask Mr. O'Donnell and have counsel look at it and see if they can resolve any disputes that they have. If there are any disputes that cannot be resolved, the court can resolve them. That may not be necessary. But Mr. O'Donnell's conditional privilege will be honored to the letter. But he does not have it in regard to those areas that are not covered. And you have a full range of the scope of discovery permitted by Federal Rule 26, subject, of course, to appropriate protective orders.

I might say if there would not be an objection to any inquiry, the fact that it is being sought would not be admissible. That is, as we know, under our normal discovery rules, it is not an objection to discovery that what is being sought is not admissible evidence. If it will lead to admissible evidence or capable of leading to admissible evidence, it is discoverable, subject to the other conditions of reasonableness and harassment and the like. I don't have to repeat that for counsel here.

One thing I should make clear that Mr. Wright suggested that may not be totally clear: When I pointed out that in some of the cases one of the purposes that is advanced in addition to allowing for a free and independent legislator and legislature, and allowing legislators not to be burdened in terms of their time and resources by having civil litigation matters, they are two principal matters.

I also mentioned one other purpose to be served is to help reinforce and insure and develop the separation of powers. That may not be totally applicable here. Most of the cases that outline that speak to the same level of government, all federal or all state. And here we have somewhat of a mixture: We have a federal claim and we have it in a state setting, a federal court in the state setting.

I think the principle is the same: I think it allows different branches to feel as though they can function within their walls and have some degree of independence, free of other branches of government, whether it is federal or state.

So this is some of the rationale that supports what would ordinarily considered to be Mr. Ortiz's beliefs. And I am not entirely sure that I can disagree with his logic or his feeling that, "It is unfair because I want information but I can't get it."

Well, these are just some of the principles that have come from the very beginnings of this form of government. And they are part of the burdens of having the benefits of an independent legislative system. Many of the privileges that we confront are sound in reason but appear to be unfair or illogical in result, whether it is the privilege of marital communication or the privilege against self-incrimination or the attorney-client privilege, immunity, and the like, doctor-patient immunity.

These are all rules that have certain very, very basic benefits, but everyone acknowledges can have very, very disappointing results.

It is not an answer that the information is needed. That will not solve the problem. Obviously if it is important, presumably it is needed.

Well, in any event, they are the court's rulings on these motions. And, Mr. Ortiz, the extent to which you want to file a motion to have the court reconsider this, you can file it, but the court will not await ruling on the motions till that's filed. You can file it and if there is some case or authority that I should re-examine or look at again, the court will do so. I am very doubtful that there would be any authorities that would cause the court to change its mind regarding Dean Freedman.

I might say, I am not entirely sure. It was raised that relevance might be a problem. I am not entirely sure if you develop what you develop even with Mr. O'Donnell where you go with that. But that's the ultimate question we have to decide: What does that show? What does that point to? What will that cause the court to do, faced with the prayer in your complaint for injunctive and declaratory relief?

But the uncertainty of its usefulness will not be today a basis for me to say you can't take the deposition, you see? I am simply saying, while that can be advanced, even if everything

you want to achieve you achieve, it could be argued then: How will that help you?

I would not use that, if that is a serious question—and it could be—I would not use that as a basis to prevent the deposition from being taken. But the deposition obviously should be within the issues in the case and should follow the normal format of developing discovery under the federal rules.

All right. Is there anything else before the court at this time?

Mr. O'Neill: Well, no, Your Honor. There are motions as to which Your Honor has reserved judgment.

If I could raise a housekeeping detail—

The Court: Yes.

Mr. O'Neill: When Your Honor originally set the briefing schedule, the briefs were to be filed at noon of the appointed day, and I gather that arose from the necessity of forwarding the copy to Judge Garth.

Mr. Wright has now asked us to mail directly to Judge Garth. And I think the briefs would be more useful to the court if we had a few more hours tomorrow. We could deliver to Your Honor and Judge Luongo by the end of the day and Federal Express to Judge Garth so he ought to have it Saturday morning.

The Court: All right. That's my concern, just that he gets it as soon as possible.

Is that all right with you, Mr. Ortiz?

Mr. Ortiz: It is no problem.

The Court: All right. Fine.

Mr. O'Neill: Thank you.

The Court: We will honor that. That's a good idea. And it will give you a little more time.

Mr. O'Neill: Just to give us a half-day more.

The Court: Sure.

Mr. O'Neill: But operating within the constraints of time, it would be helpful.

The Court: Finally, I would say this: I am going to advise Judge Luongo and Judge Garth of what I have ruled today, furnish them a copy of the transcript.

If for any reason there is any reconsideration of that, of course, on application, we will have them reconsider it, sure.

Mr.Ortiz: Your Honor, one more housekeeping detail: As I said to the court today, we are on strike at Community Legal Services. So I would ask that all mail that the court has to deliver be delivered at my house, 2010 Parrish Street in Philadelphia.

The Court: When you say "delivered," you mean mailed?

Mr. Ortiz: Mailed, yes.

The Court: All right. We will have that mailing address. What is the Zip code, Mr. Ortiz?

Mr. Ortiz: 19130.

The Court: 191—?

Mr. Ortiz: —30.

The Court: —30? We will change your mailing address until further notice to that address. All right?

Mr. O'Neill: And I understand, Your Honor, that the preliminary injunction hearing is now set for Tuesday, March 16, at 2:30 p.m.

The Court: That's correct.

Mr. O'Neill: Thank you.

The Court: We wanted it earlier, but Judge Garth simply can't do it. He has some other matters. And we are trying to work it out so we will be all set.

Mr. Ortiz: Hopefully, Your Honor.

The Court: And we will take up these important questions at that time.

And unless there is anything further, court will stand adjourned.

Mr. O'Neill: Thank you, Your Honor.

Mr. Ortiz: Thank you, Your Honor.

Mrs. Stone: Thank you.

(Concluded at 3:45 p.m.)

Order of District Court (Bechtle, *J.*).
Dated February 23, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-0480

HISPANIC COALITION ON REAPPORTIONMENT; ALFRED DELGADO, NITZA SANTIAGO, NAYDA CINTRON, and JULIO OLMEDO, individually and on behalf of all others similarly situated

—v.—

LEGISLATIVE REAPPORTIONMENT COMMISSION: DEMOCRATIC PARTY CITY COMMISSION OF PHILADELPHIA; DAVID GLANCEY and ROBERT O'DONNELL in their official capacities

ORDER

AND NOW, TO WIT, this 23rd day of February, 1982, IT IS ORDERED as follows:

1. Plaintiffs shall *file and serve* a motion for a preliminary injunction and any other preliminary relief to be sought, together with a memorandum of law in support of said motion no later than *12:00 noon on March 5, 1982*;

2. All defendants shall *file and serve* a memorandum of law in opposition to plaintiffs' motion for a preliminary injunction no later than *12:00 noon on March 5, 1982*;

3. Plaintiffs and all defendants may *file and serve* reply memoranda no later than *12:00 noon on March 10, 1982*;

4. A *hearing* will be held on plaintiffs' motion for a preliminary injunction at *2:00 P.M. on Tuesday, March 16, 1982,* in *Courtroom 17B,* United States Courthouse, Philadelphia, Pennsylvania.

S/ LOUIS S. BECHTLE, J.

Order of District Court (Bechtle, *J.*) Denying Temporary Restraining Order Dated February 23, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-0480

HISPANIC COALITION ON REAPPORTIONMENT; ALFRED DELGADO, NITZA SANTIAGO, NAYDA CINTRON, and JULIO OLMEDO, individually and on behalf of all others similarly situated

—v.—

LEGISLATIVE REAPPORTIONMENT COMMISSION; DEMOCRATIC PARTY CITY COMMITTEE OF PHILADELPHIA; DAVID GLANCEY and ROBERT O'DONNELL in their official capacities

ORDER

AND NOW, TO WIT, this 23rd day of February, 1982, the Court having considered plaintiffs' legal memoranda in support of their motion for a temporary restraining order, and the Court having further heard plaintiffs' offer of proof and the argument of counsel at the conference held on the record in open court on February 22, 1982, and the Court having concluded for the reasons stated at the conference that plaintiffs' have failed to demonstrate on the present record a sufficient likelihood of success on the merits to warrant granting a temporary restraining order, and the Court having further concluded that the harm which judicial interference in the electoral process would cause interested third parties and the

public interest also militates against granting such relief, therefore, IT IS ORDERED that plaintiffs' motion for a temporary restraining order is *denied*.

S/ LOUIS C. BECHTLE, J.

Order of Court of Appeals (Seitz, *Ch.J.*) Constituting Three-Judge Court Dated February 16, 1982

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-0480

HISPANIC COALITION ON REAPPORTIONMENT; ALFREDO DELGADO, NITZA SANTIAGO, NAYDA CINTRON, and JULIO OLMEDO, individually and on behalf of all others similarly situated,

Plaintiffs,

—v.—

LEGISLATIVE REAPPORTIONMENT COMMISSION: DEMOCRATIC PARTY CITY COMMITTEE OF PHILADELPHIA; DAVID GLANCEY and ROBERT O'DONNELL in their official capacities,

Defendants.

ORDER CONSTITUTING A THREE-JUDGE COURT

Pursuant to the provisions of Section 2284, Title 28, United States Code, I designate the Honorable Leonard I. Garth, United States Circuit Judge, and the Honorable Alfred L. Luongo, United States District Judge for the United States District Court for the Eastern District of Pennsylvania, to sit with the Honorable Louis C. Bechtle, United States District Judge for the United States District Court for the Eastern District of Pennsylvania, as members of the Court for the hearing and determination of the above captioned matter.

S/ COLLINS J. SEITZ
Chief Judge
Third Judicial Circuit

Notice of Appeal to the Supreme Court of the United States

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-0480

HISPANIC COALITION ON REAPPORTIONMENT; ALFRED DELGADO, NITZA SANTIAGO, NAYDA CINTRON, and JULIO OLMEDO, individually and on behalf of all others similarly situated,

Plaintiffs,

—against—

LEGISLATIVE REAPPORTIONMENT COMMISSION; DEMOCRATIC PARTY CITY COMMITTEE OF PHILADELPHIA; DAVID GLANCEY and ROBERT O'DONNELL in their official capacities, WILLIAM R. DAVIS, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, his successor, if any, agents, assignees, and employees,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that plaintiffs Hispanic Coalition on Reapportionment, Alfred Delgado, Nitza Santiago, Nayda Cintron and Julio Olmedo hereby appeal to the United States Supreme Court from the final order dismissing the complaint entered in this action on April 6, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1253.

s/ JUAN CARTAGENA
Puerto Rican Legal Defense
and Education Fund, Inc.
95 Madison Avenue, Suite 1304
New York, New York 10157
(212) 532-8470

By: CESAR A. PERALES
GABE KAIMOWITZ
JUAN CARTAGENA

CERTIFICATE OF SERVICE

I, Juan Cartagena, one of the attorneys for plaintiffs, do hereby certify that on the 12th day of May, 1982 I served copies of the foregoing *Notice of Appeal* to Thomas N. O'Neil, Attorney for defendant Legislative Reapportionment Commission; Antoinette R. Stone, Attorney for defendants Democratic Party City Committee of Philadelphia, David Glancy and Robert O'Donnell; John G. Knorr III, Attorney for defendant William R. Davis, Secretary of the Commonwealth of Pennsylvania; and Angel Ortiz; by mailing a copy in a duly addressed envelope, with first class postage, prepaid, to the following addresses:

THOMAS N. O'NEIL
Montgomery, McCracken,
Walker & Rhoads
Three Parkway
Philadelphia, PA 19102

JOHN G. KNORR III
Deputy Attorney General
Commonwealth of Pennsylvania
Department of Justice
Strawberry Square
Harrisburg, PA 17120

ANTOINETTE R. STONE
Fox, Rothschild, O'Brien & Frankel
2000 Market Street
Philadelphia, PA 19103

ANGEL ORTIZ
2010 Parish Street
Philadelphia, PA 19130

Notice of Appeal to the Court of Appeals

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-0480

HISPANIC COALITION ON REAPPORTIONMENT; ALFRED DELGADO, NITZA SANTIAGO, NAYDA CINTRON, and JULIO OLMEDO, individually and on behalf of all others similarly situated,

Plaintiffs,

—against—

LEGISLATIVE REAPPORTIONMENT COMMISSION; DEMOCRATIC PARTY CITY COMMITTEE OF PHILADELPHIA; DAVID GLANCEY and ROBERT O'DONNELL in their official capacities, WILLIAM R. DAVIS, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, his successor, if any, agents, assignees, and employees,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that plaintiffs Hispanic Coalition on Reapportionment, Alfred Delgado, Nitza Santiago, Nayda Cintron and Julio Olmedo hereby appeal to the United States Court of Appeals for the Third Circuit from the final order

dismissing the complaint entered in this action on April 6, 1982.

s/ GABE KAIMOWITZ

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Attorneys for Plaintiffs

Trial Transcript Before Hon. Leonard I. Garth, *U.S.C.J.*, Hon. Alfred L. Luongo, *U.S.D.J.* and Hon. Louis C. Bechtle, *U.S.D.J.* Dated March 16, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-0480

HISPANIC COALITION ON REAPPORTIONMENT, et al.,

—v.—

LEGISLATIVE REAPPORTIONMENT COMMISSION, et al.,

Philadelphia, Pa., March 16, 1982

Before

HON. LEONARD I. GARTH, C.J.
HON. ALFRED L. LUONGO, J.
HON. LOUIS C. BECHTLE, J.

Present:

GABRIEL KAIMOWITZ, ESQ.,
ANGEL ORTIZ, ESQ., and
JUAN CARTAGENA, ESQ.,
for plaintiffs

THOMAS N. O'NEILL, JR., ESQ., and
LARRY R. BARRON, ESQ.,
for Legislative Reapportionment Commission

ANTOINETTE R. STONE, ESQ.,
for Democratic Party City Committee of Philadelphia David Glancey and Robert O'Donnell

JOHN G. KNORR, III, ESQ.,
for Secretary Davis

Judge Garth: Mr. Ortiz and Mr. Cartagena?

Mr. Ortiz: Yes, sir.

Mr. Cartagena: Present.

Judge Garth: Mr. Ortiz, are you going to be presenting the plaintiffs' case?

Mr. Ortiz: We are going to be presenting the plaintiffs' witnesses, Your Honor. We have another attorney of our group that has been with the case, Mr. Gabe Kaimowitz, who has been with us throughout this case, and he is present in the court room, and he will be presenting part of the case.

Judge Garth: Very well. Suppose we just get some ground rules.

How many witnesses do you anticipate calling, Mr. Ortiz?

Mr. Ortiz: We anticipate calling four witnesses, Your Honor—five, excuse me, five witnesses, Your Honor.

Judge Garth: I am reminded by Judge Luongo because I am not too familiar with the Eastern District rules—in that respect I apologize—that if Mr. Kaimowitz has not been admitted in this court, perhaps you should move his admission.

Mr. Ortiz: I move that Mr. Gabe Kaimowitz be admitted for purposes of litigating this issue before the court in this district.

Judge Garth: You are a member of the bar, Mr. Kaimowitz?

Mr. Kaimowitz: Yes, I am, of various districts of New York and Michigan.

Judge Garth: Very well. Your motion will be granted, Mr. Ortiz.

Judge Bechtle: All right.

Judge Garth: Why don't you call your first witness, Mr. Ortiz?

Mr. Ortiz: I would like to call Mr. Robert Paul to the stand.

Judge Garth: Mr. Ortiz, do your friends on the other side know the content of what your witness will testify to? Have you, perhaps? It may very well be admitted or conceded. I don't know whether you have had any meetings with them.

Mr. Ortiz: Not fully, no. No, Your Honor.

Judge Garth: You have not told them?

Mr. Ortiz: No, we have not told them.

Judge Garth: Why don't you tell us what you expect to elicit from this witness and perhaps it will not be contested. I can't say for sure. I don't know.

Mr. Ortiz: Mr. Robert Paul will testify as to the statistics and the makeup of the final plan in terms of the different ethnic percentages that go into the 180th District and the surrounding areas. It is essentially to establish the lack of Puerto Rican participation or lack of Puerto Rican presence in the final plan as compared perhaps with a plan that was presented to the commission by one of our other witnesses and essentially to compare the plan of the legislative commission with the plan that was presented and the plan that we have proposed prior and plus a conversation with Dean Freedman that was had by Mr. Paul concerning this case.

Mr. O'Neill: Judge Garth, Thomas O'Neill, for the Reapportionment Commision.

I would object to that offer of proof on the grounds that the testimony which is desired to be elicited is irrelevant to the cause of action.

Judge Garth: Anybody else?

Judge Bechtle: Miss Stone?

Miss Stone: Yes, Antoinette Stone for the Democratic City Committee, David Glancey, and Robert O'Donnell, and I would make the objection on the same grounds as Mr. O'Neill.

Judge Luongo: As far as the question of relevancy, do you dispute the statistics that we are about to be bored with?

Mr. O'Neill: I really don't know, Your Honor.

Judge Luongo: I didn't hear you.

Mr. O'Neill: I really don't know, Your Honor. Mr. Paul submitted a plan called the Paul Plan to the Commission. I don't recall the details and I am not aware of what he is going to present.

Judge Luongo: I thought that in the moving papers there seemed to be an agreement concerning certain percentages, but perhaps I was mistaken.

Mr. O'Neill: Your Honor, I believe that the complaint refers to a district—at least Mr. Ortiz can confirm this—in the preliminary plan of 15 per cent Hispanic and a district in the final plan of approximately 40 per cent.

I have no figures as to the Hispanic population of the district.

Judge Garth: Very well. Your objection will be overruled.

You may proceed, Mr. Ortiz.

ROBERT PAUL, sworn.

Direct Examination by Mr. Ortiz:

Q. Mr. Paul, will you state your name for the court, please? A. Yes. My name is Robert Paul.

Q. Are you a resident of Philadelphia, Mr. Paul? A. Yes, sir, I am.

Q. Where do you reside in Philadelphia? A. My address?

Q. Yes. A. 22 East Sedgwick, Philadelphia.

Q. Are you employed within the City of Philadelphia? A. Yes, sir. I am an attorney employed in the City of Philadelphia.

Q. I can't hear you. A. I said I am an attorney employed in the City of Philadelphia.

Q. For whom do you work. A. Oh, boy. Is that—the law firm I am employed by is known as Shein and Brookman.

Q. Mr. Paul, are you acquainted with the final redistricting plan of the legislative commission? A. Yes, sir, I am.

Q. Could you tell the court how you came to be acquainted with the whole redistricting process as instituted in the State of Pennsylvania? A. When the commission pursuant to the constitutional provisions under which the commission is constituted published its preliminary plan in the newspapers, which it

is required to do, I have had a long time interest in politics and the political process, and so I read the publication which appeared from the commission which set out what its proposed plan for Philadelphia for the State House and for the State Senate districts are.

Subsequently feeling as I did then and do now that the plan violates both the federal and the state constitutions on a variety of grounds, I submitted what Mr. O'Neill very kindly referred to as the Paul Plan to the commission in which I attempted to point out to them their manifest errors and why they should be changed, what my opinion was of the manifest errors.

Q. I was going to show you a map of a legislative plan. It is attached to our complaint as Plan 1, as such, and maybe you could identify for the court this as the preliminary plan submitted by the legislative commission. A. Well, I frankly don't know—only what appears. The document purports to be the plan, preliminary legislative reapportionment plan, filed August 20, 1982, Philadelphia House of Representatives districts, published by William R. Davis, Secretary of the Commonwealth.

> Judge Garth: What is your question to the witness, Mr. Ortiz?
>
> Mr. Ortiz: I just want him to identify the plan and maybe we can stipulate that this is the preliminary plan as submitted by the legislative commission if Mr. O'Neill has—
>
> Mr. O'Neill: I haven't had an opportunity. If we can proceed on that assumption, I will inform you and the court if it is incorrect.

By Mr. Ortiz:

Q. Did you happen to draw up your own plan, Mr. Paul? A. Yes, I did.

Q. So you are very well acquainted with the ethnic and racial breakdowns of the different counties and districts within the county of Philadelphia? A. Well, I would say that I'm relatively familiar. I can't represent to you or to the court that I am absolutely one hundred per cent knowledgeable about that with respect to every district.

Q. Are you knowledgeable as to District 180 of the final plan as presented by the commission? A. Yes, sir; yes, sir, I am.

Q. Is 180, which has been identified by the commission as the Hispanic District—could you please tell the court what the breakdown statistically of the population is in that district? A. These figures were derived by me from a document that I obtained from the Legislative Data Processing Center. I have a copy of that. I brought that in case the court or Mr. O'Neill wished to see that.

I also extracted from that certain pages that are relevant to these districts. These documents contain by ward and division within the city a breakdown of the total population, a breakdown of white, black, and other categories, white, black, Asian or oriental, other, and Spanish.

Based upon the final commission plan that was published in the newspapers, as a result of the hearings which I brought a copy of if that were important, I then attempted to compute the percentages.

The difficulty I must confess in advance in doing this is that the numbers are somewhat difficult to compute because it appears to me that some of the Spanish population was counted twice or three times. They appear in various categories.

Judge Garth: Pardon me. Could I have the question that Mr. Ortiz asked? (The question was read.)

The Witness: 40 per cent—

Judge Garth: Mr. Paul, we will get along a lot faster and a lot better if you listen to the question that Mr. Ortiz asked which was a very direct question, and if you answer it responsively, and if he desires additional information, I am sure that he will ask you.

Is your answer to the question, "40 per cent"?

The Witness: Yes, sir, it is. I apologize for—

By Mr. Ortiz:

Q. What is the percentage of the white population in that district? A. The white population according to my papers is 52, approximately 52 per cent.

Q. And the population of the black community? A. 8 per cent.

Q. Were you able to also look at the percentages of District 179? A. Yes, sir, I was.

Q. And could you please state to the court what the breakdown of that district was? A. Again you want it broken down Spanish, black, white?

Q. Spanish, Puerto Rican, black, and white. A. Spanish, 20 per cent; black, 19 per cent; white, approximately 60 per cent.

Q. What about District 181? A. In District 181, Spanish, 12 per cent; black, 38 per cent; white, approximately 50 per cent.

Q. And District 177, did you break that down? A. I did not do that.

Q. All right. In the course of the presentation to your knowledge or belief, was the fact that Puerto Ricans were excluded from the preliminary plan ever presented to the commission? A. Yes, sir, to the best of my knowledge, it was.

Q. Did you make note of that in your testimony? A. Yes, sir, I did.

Q. In the course of—

Judge Garth: Could I ask you a question?

Mr. Ortiz: Yes, sir.

Judge Garth: What testimony?

The Witness: When the preliminary plan was presented, as a result of the preliminary plan, there was a public hearing at which—

Judge Garth: Was that before the legislative reapportionment commission?

The Witness: Yes, sir, it was.

Judge Garth: All right. Thank you.

The Witness: And I presented a written presentation to the commission. And that's what I am referring to, sir.

By Mr. Ortiz:

Q. Are you acquainted with Mr. James Freedman? A. Yes, sir, I am.

Q. Will you tell the court how this acquaintanceship has developed? A. Yes, sir. He was my administrative law professor in law school and also was the sponsor for me of a summer program that I was engaged in.

Q. Did you at any time discuss with James Freedman the development of the reapportionment plan or the inclusion of the Puerto Rican or Hispanic community within the reapportionment plan? A. Yes, sir, I did.

Q. What was the nature of this discussion you had with Mr. Freedman? A. Well—

Judge Garth: Just a moment. Your objection?

Mr. O'Neill: Objection, if Your Honor please, based on legislative privilege. Any explanation by Dean Freedman of a plan which he has enacted as a legislator is, I would suggest, inadmissible.

Judge Garth: We are not asking Dean Freedman, now. I am going to allow this question. You may object as the questioning proceeds.

By Mr. Ortiz:

Q. Or, before you proceed—

Judge Garth: Well, now, you have a question. You have a question to which there was an objection and a ruling. I want to hear the answer to that question. Then you may proceed, Mr. Ortiz.

Mr. Ortiz: Thank you.

By Mr. Ortiz:

Q. Go ahead.

Judge Garth: Let's have the question read by the reporter.

(The question was read.)

A. Yes, I had two conversations with him on the subject. One was a telephone conversation with him in which he promised to consider my objections to the plan with respect to the Puerto Ricans. The other conversation I had with him occurred on the corner of Broad and Walnut, the northwest corner, I believe on the day before the final plan was published. My recollection is that that was Columbus Day and therefore was a public holiday.

I encountered him on the street, and I asked him specifically about the Puerto Rican District. And I said to him, "Jim, Mr. Freedman, will the Puerto Ricans get a Puerto Rican majority district?"

And he answered me and said no, that they would not, that it was his opinion as a matter of law that they were entitled to approximately 30 per cent and that any percentage higher than that was not required in his view and that the plan as I would see it the following day, because he refused to show it to me, would essentially reflect that position.

At that point he turned and walked in the direction toward Democratic City Committee.

By Mr. Ortiz:

Q. Did he mention any names at that point? A. He mentioned your name, sir, and he said, "Ortiz"—I'm glad you—he said, "Ortiz raised this problem, but that's my response to it," was what he said.

When he said, "Ortiz," I assumed he meant with you.

Judge Bechtle: Do you mean he walked in the direction generally of the Democratic City Committee? You mean he walked west?

The Witness: He walked west, that's right.

Judge Bechtle: All right.

Mr. Ortiz: I have no further questions, if Your Honor please.

Judge Garth: Very well,

Is there examination, Mr. O'Neill?

Mr. O'Neill: I have no questions, sir.

Judge Garth: You have no questions?

Mr. O'Neill: I have no questions, sir.

Judge Garth: Miss Stone?

Miss Stone: No questions.

Judge Garth: Mr. Knorr?

Mr. Knorr: No, Your Honor.

Judge Garth: I beg your pardon. I didn't mean to ignore you, Mr. Knorr.

Mr. Knorr: Yes.

Mr. Ortiz: No further questions.

Judge Garth: You may step down, sir.

Mr. Ortiz: I would like to call Mr. Jim Mahoney.

Judge Garth: Mr. Mahoney?

Again, before the witness is sworn, would you just very, very briefly tell us about what you expect to elicit from Mr. Mahoney in the event that there is no problem with you adversaries?

Judge Bechtle: You may be seated.

Mr. Ortiz: Mr. Mahoney presented a plan to the commission first of all that comprised and structured the district following the constitutional guidelines set down by the Pennsylvania Constitution, contiguous, compact, and adhered to the one-man, one-vote rule. And this plan that he presented specifically referred itself to a plan with a Puerto Rican District within its boundaries and in fact his testimony before the commission went directly at the fact that the Puerto Rican community will be excluded from the preliminary plan and he was presenting that.

Judge Garth: I beg your pardon.

Mr. Ortiz: Also there is some statements and connections that we have made the Democratic City Committee a defendant within this action, and Mr. Mahoney has some testimony that goes directed at the inclusion and the participation of the Democratic City Committee within the whole process of the preliminary and the final plan.

Judge Garth: May I just ask you one question? Are any of the four plans that were attached to your complaint one of the plans of Mr. Mahoney?

Mr. Ortiz: Yes, it is, Your Honor.

Judge Garth: Which one is that, sir?

Mr. Ortiz: That's Plan No. 2, Your Honor.

Judge Garth: I am sorry?

Mr. Ortiz: Plan No. 2.

Judge Garth: Very well.

Is there a reaction, Mr. O'Neill?

Mr. O'Neill: I make the same objection as to lack of relevancy, if Your Honor please.

Judge Garth: I understand. I make the same ruling.

JAMES MAHONEY, sworn.

Direct Examination by Mr. Ortiz:

Q. Would you state your name for the court? A. Mr. James Mahoney.

Judge Garth: Just before you start, I am reminded by Judge Luongo of a matter that the court is concerned about. I will be and the court will be interested in knowing today whether or not after the witnesses have been produced and the evidence adduced there is a desire to turn this accelerated into a permanent hearing as distinct from preliminary and whether there is any objection to that. And we would like representations from both sides with respect to it.

Now, I don't know whether you are in a position to tell us now or if you prefer waiting until this testimony is concluded.

Mr. Ortiz, are you in a position?

Mr. Ortiz: We have no problem with that.

Judge Garth: You have no problem with that? That is you would just as soon we consider this as the final hearing?

Mr. Ortiz: Yes.

Judge Garth: Is that correct?

Mr. Ortiz: Yes, Your Honor.

Judge Garth: And that you would have no other evidence other than what you intend to produce today?

Mr. Ortiz: That is exactly correct.

Mr. O'Neill: May I just confer with co-counsel, please?

Judge Garth: Of course, you may.

Mr. O'Neill: Thank you.

(Discussion off the record at counsel table.)

Judge Garth: Yes, Mr. O'Neill?

Mr. O'Neill: If the court please, all counsel on this side of the aisle agree that this may be conducted as a final hearing.

Judge Garth: Very well, then. The court will then treat this as the final hearing, permanent hearing, and not as a preliminary injunction hearing.

You may proceed, Mr. Ortiz.

By Mr. Ortiz:

Q. Mr. Mahoney, will you state your name for the court? A. James Mahoney.

Q. Are you employed within the City of Philadelphia? A. I am an official of the AFL-CIO.

Judge Bechtle: Could I just ask you to move your chair up and speak into the microphone and then we can hear; otherwise we will have to ask you to repeat it.

The Witness: I am an official of the AFL-CIO. That's the American Federation of Labor, Congress of Industrial Organizations.

Judge Garth: Don't drop your voice, Mr. Mahoney. Keep it up. Though that was all right.

All right.

By Mr. Ortiz:

Q. What is your position within the AFL-CIO? A. I am co-ordinator of the Philadelphia Council, AFL-CIO.

Q. Are you acquainted with Mr. David Glancey? A. Yes, I am.

Q. Are you acquainted with Mr. Robert O'Donnell? A. Yes, I am.

Q. Have you had any occasion within the last year to discuss with either Glancey or O'Donnell a redistricting plan for the City of Philadelphia? A. The AFL-CIO is very concerned with legislative reapportionment.

Judge Garth: The question was—

The Witness: I am just trying to make it logical if I can.

Okay. Yes, I have. Yes, I have.

Judge Garth: That's the answer. All right. "Yes, I have."

By Mr. Ortiz:

Q. In what context was this relationship with Mr. O'Donnell and Mr. Glancey established? A. Concerning legislative reapportionment.

Q. Have you ever had any conversation with Mr. Glancey or Mr. O'Donnell concerning the reapportionment process? A. A letter was sent to Mr. Glancey on the subject, which I have a copy of, dated August 5th.

Q. Could you read the letter to the court, please? A. I will pass it to the judges. It states that we would like—

Judge Garth: He wants you to read the letter. So if you would, Mr. Mahoney—

The Witness: "As to the problem involving reapportionment of the statewide"—

Judge Garth: Mr. Mahoney—

The Witness: All right. I am sorry. I will go slowly.

Judge Garth: Will you go slowly? That's the way.

The Witness: "As to the problem involving statewide legislative districts in Pennsylvania, it has come to my attention that without mutual review wherein we have mutual concerns and interests, a proposal has been submitted to the Democratic Caucus in Harrisburg without consultation with this council"—

—that meaning AFL-CIO Council.

"For the record, we have been through so much that nothing could disturb our traditional long-term relations. Any such unilateral action should not continue. We of organized labor and again with the traditional partnership with the Democratic Party have a stake in reapportionment in Congressional statewide and Philadelphia areas. Even at this point in time can you not reflect that we have not had a mutual discussion that we should have had a mutual discussion and a resolution of some of the Philadelphia problems in which both personal and political labor has an intense interest?

"May I hear from you as promptly as possible on this matter?

"Very truly yours, Edward F. Touhey, President"

By Mr. Ortiz:

Q. What was the response to that letter? A. Mr. Touhey received a telephone call from Representative O'Donnell.

Q. Were you present?

Judge Garth: Mr. Touhey? Would you identify Mr. Touhey for me?

The Witness: Mr. Touhey is the President of the AFL-CIO Council in the City of Philadelphia.

By Mr. Ortiz:

Were you present when that telephone call was received? A. Yes.

Q. Are you aware who was on the other side of that telephone call? A. I took for granted that on the other side of that call was Representative O'Donnell. I cannot—there is no way in the world that I could—

Q. Did you have any follow-up, any conversation with Robert O'Donnell, after that. A. A meeting was set up.

Judge Bechtle: Could I just ask you, were you listening? Or were you sitting by and watching somebody else listen?

The Witness: No, I was sitting in the office when the conversation was held.

Judge Bechtle: Right. But the phone was on someone else's ear, not yours?

The Witness: Yes. It was not on my ear.

Judge Bechtle: All right.

By Mr. Ortiz:

Q. Was there a follow-up meeting with Mr. O'Donnell? A. Yes, there was. My conversation had to do with making an appointment for Mr. O'Donnell to come over and visit with us.

Q. Regarding the reapportionment plan? A. Yes, reapportionment.

Q. What transpired at that meeting with Mr. O'Donnell? A. Mr. O'Donnell came over to represent City Committee to discuss the reapportionment plan which was submitted by City Committee to the Reapportionment Commission.

Q. A plan was submitted by the City Committee to the Reapportionment Commission? A. Yes.

Q. You had direct knowledge of that? A. I received a copy of the plan from Harrisburg which was the plan that was in question.

Q. And what was the nature of your conversation with Mr. O'Donnell at that time? A. The nature of the conversation was we felt that that plan disturbed the neighborhoods, the political structure, and did not deal with the ethnic make-up of the City.

Q. Did Mr. O'Donnell respond to your concerns? A. He listened to our concerns.

Q. And did he respond in any manner whatsoever? A. I felt that he thought that we had—

Judge Garth: No. The question is, did he respond?
The Witness: Yes, he did respond.
Judge Garth: All right. Next question.

By Mr. Ortiz:

Q. What did he say? A. He responded that he understood our concern.

Q. Did he say he was going to do anything about it or that he had a role to play in doing something about it? A. He indicated that members of his staff were working on this problem.

Q. Subsequent to that, did you have an opportunity to go before the legislative commission? A. Yes, we did.

Q. And at that time did you present a plan to the legislative commission? A. Yes. We were given five minutes to do a very difficult task.

Q. In your presentation before the legislative commission, could you please state to the court what specific aspect of the preliminary plan did you point out that was constitutionally deficient? A. We drew—

Judge Garth: Just a moment.
The Witness: I am sorry.
Judge Garth: Mr. O'Neill?
Mr. O'Neill: If the court please, Mr. Mahoney's testimony before the Commission is of record and I would suggest could be made available to the court. It speaks for itself.

Judge Garth: What about that, Mr. Ortiz?

Mr. Ortiz: Well, I would like to make it part of the record, but I would like also to make it part of the record here before this court, that Mr. Mahoney's testimony went directly at the establishment of a Puerto Rican District that comprised 54 percent of the population.

Judge Garth: As I understand Mr. O'Neill's statement, he is indicating that he has no objection to having this witness's testimony before the legislative reapportionment commission put in evidence in this hearing.

Mr. O'Neill: Yes, sir.

Judge Garth: Do I understand you correctly?

Mr. O'Neill: Yes, sir.

Mr. Ortiz: I have no objection. Fine, Your Honor.

Judge Garth: Very well.

Mr. Ortiz: We have no further questions.

Judge Garth: You will have to offer it and have it marked.

Mr. Ortiz: I would like to offer then and stipulate—

Will you stipulate to that?

The Witness: I—

Judge Garth: Just one moment.

The Witness: I am sorry.

Judge Garth: There is no question pending.

The Witness: I am sorry.

Mr. Ortiz: I would like to offer Mr. Mahoney's testimony as Plaintiff's Exhibit No. 1.

Judge Garth: Mr. O'Neill?

Mr. O'Neill: I have no objection to it, once it is actually offered to Your Honor.

The Witness: A map is missing from that.

Judge Garth: Other counsel? Are you familiar with it, Miss Stone and Mr. Knorr?

Miss Stone: Yes, I am familiar, Your Honor, and I have no objection.

Judge Garth: Mr. Knorr?

Mr. Knorr: I have no objection, Your Honor.

Judge Garth: Very well. If it is in suitable form to be marked, please give it to the clerk to be marked as Plaintiff's Exhibit 1.

Mr. Ortiz: I do not have the testimony. The Commission didn't make that available.

Judge Bechtle: We have that here.

And, Mr. O'Neill, is that part of the volume you have?

Mr. O'Neill: The oral testimony, Judge Bechtle, has been transcribed by our reporter.

Judge Bechtle: I mean the volume now in our possession, I assume some of the pages are Mr. Mahoney's testimony; is that correct?

Mr. O'Neill: Yes, sir.

Judge Bechtle: About how many pages?

Mr. O'Neill: Very few. Four, five, or six pages.

Judge Bechtle: Maybe we could have that Xeroxed while we are here.

Mr. Ortiz: He said he only spoke for five minutes.

Judge Bechtle: Well, nevertheless, we can have it done right now.

Miss Coe, would you make three copies of those pages?

And then, Mr. Ortiz. that will be an exhibit and offered. And it may be you want to mark these other papers you have identified as exhibits, too.

Mr. Ortiz: Yes, sir.

Judge Bechtle: There will be one or two other letters, I think, that were referred to. And just tell Mr. Dunbar the number it will be.

Mr. O'Neill: As Judge Bechtle will recall, Mr. Ortiz's statement that this was not made available to him is in error because it was offered to Mr. Ortiz in Your Honor's presence.

Judge Bechtle: That's correct. It may be he hasn't seen it but it was offered.

Judge Garth: Miss Stone and Mr. Knorr, I wonder whether we can impose upon you to agree that unless you have a separate objection or a different position than Mr.

O'Neill that we will look to Mr. O'Neill to make the lead objection? Is that agreeable to you?

Miss Stone: That's fine, Your Honor, with that proviso that you just mentioned, yes.

Mr. Knorr: Agreeable to me, Your Honor.

Judge Garth: Mr. O'Neill, you have been crowned and selected as lead counsel. If you make an objection and the other parties do not have any supplementary matters, we will look to you only rather than canvassing all three of you co-counsel.

Mr. O'Neill: Certainly, Your Honor.

Judge Garth: That doesn't prevent, of course, any other counsel from making their own separate objection.

Mr. O'Neill: Or from possibly disagreeing with any objection because we do represent different parties.

Judge Garth: I understand that. Very well.

Mr. O'Neill: Thank you, Your Honor.

Mr. Ortiz: One further question, Your Honor.

Judge Garth: Of course.

Mr. Ortiz: I would like to submit the letter, if there is no objection from Mr. O'Neill, as Plaintiff's Exhibit No. 2.

Judge Garth: The letter that he read?

Mr. Ortiz: The letter—

Judge Garth: That's in evidence already.

Judge Bechtle: Just to be marked.

Judge Luongo: Mark it.

Judge Bechtle: That's P-2. All right.

By Mr. Ortiz:

Q. Mr. Mahoney, do you have a copy of the map that you presented to the legislative commission with you. A. Yes, I do. I think that's in there.

Mr. Ortiz: I would like to make that Plaintiff's No. 3, Your Honor.

Judge Garth: All right. Have all counsel seen the map? Mr. O'Neill?

Mr. O'Neill: No, sir, we have not been furnished with any exhibits.

Judge Garth: Very well. Mr. Ortiz, show counsel what you are offering in evidence.

Mr. O'Neill: May I ask the witness a question just to clear this up?

Judge Garth: Of course, you may.

Mr. O'Neill: Because the commission got loads of maps submitted, hundreds of them.

Judge Garth: All right. Have it marked P-3 for identification so that we can refer to it.

Mr. O'Neill: Mr. Mahoney, I recall your testifying before the commission. Is this the map you were presenting at the time you testified?

The Witness: One of the maps I brought before the commission.

Mr. O'Neill: Right. And it was in that hearing, not at some other time?

The Witness: No, it was at that hearing.

Mr. O'Neill: Thank you very much.

No objection.

Judge Luongo: Counsel may mark it.

Judge Bechtle: Sure. Mr. Ortiz can put a P-3 on there. She will be back.

All right. That's P-3.

By Mr. Ortiz:

Q. And that plan describes a district that was 54 per cent Puerto Rican? A. 54.3.

Q. 54.3 per cent Puerto Rican? A. Yes.

Mr. Ortiz: Thank you. No further questions.

Excuse me. One further question.

Judge Garth: Very well.

By Mr. Ortiz:

Q. Do you happen to know the percentage of blacks in that district? A. It's—if you look at the—

Judge Garth: The question is, do you happen to know? Either yes or no? Do you know or not?

The Witness: No. But it is very difficult to know. I am sorry.

Judge Bechtle: Okay.

Mr. Ortiz: No further questions.

The Witness: Because of the way it is registered in records.

Mr. O'Neill: I have no questions, if Your Honor please.

Miss Stone: No questions.

Mr. Knorr: No, Your Honor.

Judge Garth: You may be excused, thank you.

The Witness: Thank you.

Judge Garth: Call your next witness, Mr. Ortiz.

Mr. Ortiz: I would like to call Representative Marty Mullen, Mr. Martin Mullen, to the stand.

MARTIN P. MULLEN, sworn.

Judge Garth: When the witness is being sworn, I don't like people moving around the court room.

Mr. Ortiz: I apologize.

Judge Garth: All right. It is good to know that.

Direct Examination by Mr. Ortiz:

Q. Mr. Mullen, would you state your name once again for the court? A. Martin P. Mullen.

Q. What is your present occupation? A. I am a State Representative and I am an attorney.

Q. How long have you been a member of the House of Representatives? A. Twenty-eight years.

Q. Are you acquainted with Mr. David Glancey? A. Yes, I am.

Q. What has been your relationship with Mr. David Glancey? A. He is the Chairman of the Democratic City Committee.

Q. Are you acquainted with Mr. Robert O'Donnell? A. Yes, he is a State Representative.

Q. Are you acquainted with Representative Mandarino? A. Yes, he is the minority leader, Democratic minority leader in the House, and a member of the Reapportionment Commission.

Q. Was he the senior Democrat for the Reapportionment Committee? A. Yes. LeRoy Ervis was supposed to take over because the Constitution provides for him, but he designated his role to James Mandarino, the minority leader.

Q. Are you acquainted with the Reapportionment Plan submitted by the Democratic City Committee? A. Indeed I am.

Miss Stone: Objection; move to strike the answer.

Judge Garth: I am sorry?

Miss Stone: Objection and move to strike the answer.

Judge Garth: May I have the question and the answer?

(The testimony was read.)

Judge Garth: May I have the basis of your objection?

Miss Stone: The question assumes a fact which is not in evidence.

Judge Garth: Well, I will overrule your objection. You may proceed.

By Mr. Ortiz:

Q. When did you find out about that, the Democratic City Committee was developing a plan for the reapportionment of the State, of the City? A. Just before the Committee met I was informed that a plan was submitted by both the Democratic City Committee and the Republican City Committee.

Q. Did you study that plan that was submitted by the Democratic City Committee? A. Yes. I had an opportunity to look at both plans.

Q. And you voiced objections to it? A. Yes, I did.

Q. To whom did you voice these objections? A. Well, I voiced an objection to our member on the Committee, Representative James Mandarino.

Q. And what did Mr. Mandarino say to you at that time?

Judge Garth: Yes?

Just a moment. There is an objection.

Mr. O'Neill: The same objection as made before, if Your Honor please.

Judge Garth: That this is irrelevant?

Mr. O'Neill: In the context of Dean Freedman, that it is protected by the legislative privilege as well.

Judge Garth: Very well. Overruled.

You may proceed.

Let's have the question again.

(The question was read.)

A. I voiced them to James Mandarino who was the member on our Democratic side on the Commission.

Q. And what did Mr. Mandarino say to you at that time? A. Mr. Mandarino indicated to me that the Democratic Plan that was being submitted was being handled by Representative Bob O'Donnell from Philadelphia who represented the City Committee in the Democratic Caucus.

Q. Did he feel that that was a plan that was going to be accepted? Did he indicate that that was the plan that the Commission was going to put forward? A. No, he just indicated that he had received the plan, it was submitted by the City Committee and they were going to try to follow it.

Q. They were going to try to follow that? A. Yes.

Q. Was the plan that was submitted by the Democratic City Committee the preliminary plan that was put forward by the Commission as its own plan? A. Yes, that's correct.

Q. Did the Commission make any modifications that you are aware of from the preliminary plan to its final plan that they submitted on October 19th? A. Yes, there were two modifications.

Q. What were they? A. Before the original plan was submitted to the public by the Commission, they had to make some minor adjustments in areas of the City which didn't affect me, so I didn't get involved in that, and then after the preliminary hearing, which is required by law, they made the adjustment in the area, the Puerto Rican area.

Judge Garth: I don't understand your answer. I thought you said there were two modifications made to—

Mr. Ortiz: —the preliminary—

Judge Garth: —Preliminary Plan 1 which were reflected in the final plan.

The Witness: That is correct, Your Honor.

Judge Garth: Would you just briefly state those modifications again?

The Witness: Yes. The original plan submitted by the Democratic City Committee had to be adjusted. Some minor adjustments had to be made up in the area of the Roxboro and Manyunk area and Bob O'Donnell's area. There were a few adjustments made there. I don't know what they were because I wasn't particularly interested in that. That's the only adjustment that I know was made.

And then after the first hearing, first public hearing of the preliminary plan, the Commission came out with a second modification.

They're the only two that I have any knowledge of.

By Mr. Ortiz

Q. This second—

Judge Garth: Just a moment. There is a question.

Judge Bechtle: That area you mentioned does not involve Districts 180, 181, 179, 177, does it?

The Witness: No.

Judge Bechtle: All right.

The Witness: The second modification—

Judge Bechtle: The first one. Just for our record here, because someone who read it may not know where Rox-

boro is. That's beyond the area we are talking about in this case.

The Witness: That's correct. That's up in the 21st Ward area, in that area.

Judge Bechtle: So the second modification, what is your remembrance of that?

The Witness: Well, the second modification is what was made public. That was a final draft submitted by the Commission.

By Mr. Ortiz:

Q. And that modification affected what population in the City? A. Well, basically it affected—the second modification I am not that familiar with, Mr. Ortiz. I can't definitively describe that because as I said before, that was not an interest of mine.

Q. But did it have to do with the Hispanic area? A. Yes, I'm sure of that, yes.

Q. You said that then, after you spoke to Mr. Mandarino, you were referred to speak with Mr. O'Donnell. A. Yes, he indicated to me that Mr. O'Donnell was representing the City Committee.

Q. And did you speak to Mr. O'Donnell then at any time? A. Yes. I asked Mr. O'Donnell to—if he would mind coming up to my office. I was Chairman of the State Government Committee. And my office was on the fifth floor. And he and a member of his staff came up to my office and I discussed my particular area with him.

Q. And what did Mr. O'Donnell respond to your concerns?

Judge Garth: Just a moment.

Yes?

There is an objection.

Miss Stone: Yes. I object on the grounds that the subject matter which the question is probing is privileged by reason of the legislative immunity afforded Representative O'Donnell.

Judge Garth: That's your only objection?

Miss Stone: That's my objection, yes.

Mr. O'Neill: I would also raise an objection of irrelevance unless it is established that Mr. Mullen's area is the area that is concerned in this lawsuit.

Judge Garth: Well, I will overrule Miss Stone's objection and I will sustain your objection, Mr. O'Neill, without prejudice, of course, to Mr. Ortiz to develop that matter.

Mr. Ortiz: Your Honor, we are trying to establish that—

Judge Garth: All you have to do is ask the next question, Mr. Ortiz.

By Mr. Ortiz:

Q. Your conversation with Mr. O'Donnell, did it relate to the reapportionment plan submitted by the Democratic City Committee? A. Mr. O'Donnell said he had nothing whatever to do with the Democratic City Committee's plan.

Q. And, Mr. Mullen, prior to that conversation, Mr. O'Donnell had stated what?

Judge Garth: Just a moment.

Mr. O'Neill: Your Honor, I really am disinclined to interrupt these proceedings.

Judge Garth: You have a perfect right to object, Mr. O'Neill, if you desire to.

Mr. O'Neill: Not only is the witness being led but the last answer was completely unresponsive to the question which Your Honor invited counsel to make in order to overcome my objection.

Judge Garth: Are you objecting because it was a leading question, sir?

Mr. O'Neill: Yes, I am.

Judge Garth: I am sustaining the objection.

Mr. O'Neill: And I am moving to strike the prior answer as well.

Judge Garth: I will strike the prior answer.

By Mr. Ortiz:

Q. Mr. Mullen your meeting in your office with Mr. O'Donnell, could you tell the court the nature of that conversation? A. Yes. I particularly pointed out to Bob O'Donnell the particular area I was in and I had pointed out to him certain suggestions that should be followed.

Judge Garth: Yes, Mr. O'Neill?
Mr. O'Neill: I renew my objection.
Judge Garth: Your objections will be sustained.
Mr. Ortiz: I have no further questions of this witness.
Judge Garth: Very well.
Just one moment, sir?
Mr. O'Neill?
Mr. O'Neill: I have no questions, thank you.
Judge Garth: Miss Stone?
Miss Stone: No questions.
Judge Garth: Mr. Knorr?
Mr. Knorr: No questions, Your Honor.
Judge Garth: You may be excused.
The Witness: Thank you.

Mr. Kaimowitz: Plaintiffs at this time call Mr. Glancey.

Mr. O'Neill: If the court please, since Mr. Glancey is going to take the stand, may I suggest that the normal procedure for objecting now be reversed and it should be the lawyer representing Mr. Glancey who should take the lead in making the objections?

Judge Garth: Well, I have no objection if you gentlemen don't. Very well.

DAVID GLANCEY, sworn.

Mr. Kaimowitz: In keeping with the practice established by this court, indicating an offer of proof prior

to the testimony of witnesses, we call David Glancey, who is a defendant herein, primarily to expand and elucidate on a transcript that he made with Mr. Ortiz for television production which was submitted with the complaint and is entitled "Latinos in the Delaware Valley," and to explain the connection between the role of the defendant, Democratic City Committee, and the defendant, Legislative Reapportionment Commission, as well as to the extent that it is necessary to identify each of the four plans that have been submitted with the complaint and that knowledge that he personally has about those plans, particularly Plans 1, 2, and 3. That is a preliminary plan, a plan that was already alluded to by Mr. Mahoney with regard to a 54 per cent Puerto Rican population and then the final plan that was adopted by the Commission.

Judge Garth: Miss Stone?

Miss Stone: The plaintiffs requested and we agreed to stipulate to certain of the statements made on this TV program by Mr. Glancey. I don't know what the plaintiff's intention is now, but perhaps it would expedite the proceedings if we could stipulate to certain of the statements that were made.

Mr. Kaimowitz: Your Honor, simply—

Judge Garth: Is there any question but that the entire transcript with which the court has been furnished was the transcript of the television program—I don't have the date on it—of January—well, I think it was in December but it was transcribed on January 20, 1982? Do I understand you to say that you do not agree that the transcript which we have reflects all of the conversation that took place on that television telecast?

Miss Stone: I do agree.

Judge Garth: You do agree?

Miss Stone: Yes.

Judge Garth: Mr. Kaimowitz?

Mr. Kaimowitz: I was about to proceed with this witness. The first thing I would do would be to have this

marked as an exhibit merely for identification and move its admission as an exhibit.

Judge Garth: There doesn't seem to be any objection to marking the entire transcript in evidence, is there?

Miss Stone: No.

Judge Garth: Mr. O'Neill?

Mr. O'Neill: No.

Judge Garth: Mr. Knorr?

Mr. Knorr: No.

Mr. Kaimowitz: Plaintiff's Exhibit 4, I believe.

Judge Bechtle: All right.

Mr. O'Neill: I would also make an objection to the offer of proof on the ground that it seeks testimony not relevant.

Judge Garth: I understand, and I will overrule your objection, Mr. O'Neill.

Direct Examination by Mr. Kaimowitz:

Q. Mr. Glancey, would you state your full name for the record, and your address locally? A. Okay. It is David Glancey, and my business address is 1421 Walnut Street, Philadelphia.

Q. And by profession you are—? A. I am an attorney.

Q. And what is your position if any with the defendant, Democratic City Committee? A. I am the Chairman of the Democratic City Committee.

Q. And how long have you held that position? A. Since December of 1979.

Q. And what if any formal role do you have in preparing reapportionment plans for submission to the Legislative Reapportionment Commission in your capacity as chairperson, first of all? A. There's no formal role.

Q. All right. What role if any did you undertake with preparing such a plan for presentation to the Commission? A. I had discussions with members of the party and the overall attempt was to kind of put a political look, I suppose, on the plan.

Judge Bechtle: Would you just sit a little closer to the microphone?

Judge Garth: Would you read the question and answer, please?

(The testimony was read.)

Judge Garth: Thank you.

By Mr. Kaimowitz:

Q. Are you familiar with the representation in the local press that both a Republican and a Democratic plan was in fact submitted to the Legislative Reapportionment Commission? A. I am familiar with those reports.

Q. Do you consider those reports to be accurate or inaccurate?

Miss Stone: Objection.

Judge Garth: Yes, sustained.

By Mr. Kaimowitz:

Q. On page 14 of Plaintiff's Exhibit 4, which is in fact the transcript, Mr. Ortiz asked you at lines 23 and 24:

"Right. But again going into that issue of the reapportionment, the City Committee was very influential in the process, was it not."

You responded simply, "Yes."
Is that correct?

Miss Stone: Objection.

Judge Garth: Yes? And your objection is what, Miss Stone?

Miss Stone: It is my understanding that we have stipulated to the contents of the transcript.

Judge Garth: Yes, what about that, Mr. Kaimowitz?

Mr. Kaimowitz: Your Honor, I am trying to amplify, now, on what the meaning of what "Yes" is, what Mr.

Glancey meant by being very influential in the process, which is not filled out by the transcript itself. In other words, the only thing that I will ask from the transcript is that material which is not in fact contained therein but which would indicate that the witness had further expanded knowledge than is presented in that transcript.

Judge Garth: Miss Stone?

Miss Stone: I am not sure I understand his explanation, but I would object to any eliciting of evidence that is merely cumulative.

Judge Garth: Well, I gather, as I understand it, that this is not to be cumulative; this is similar to questions that he might ask independent of the transcript, and he prefers using the transcript as a framework in order to couch his questions.

If you are objecting, Miss Stone, on that basis, I will overrule it. If you have some other grounds to object, I will hear you.

Miss Stone: No, Your Honor.

May I simply ask what page you are one, Mr. Kaimowitz?

Mr. Kaimowitz: Yes. I am sorry. I am reading from 14 to 23 exclusively and I am now at the top of page 15 on which Mr. Glancey has responded that the Democratic City Committee was very influential in the process.

By Mr. Kaimowitz:

Q. And you responded, "Yes."

My question to you is, in what way and how was it influential? A. Well, as I said, we made certain suggestions and some of those suggestions were carried out.

Q. Okay. And the next question is, "Did you consult with the Commission?"

Your response was, "Absolutely, sir."

And my question to you then is, with whom did you consult and how frequently?

Judge Garth: Well, now, Mr. Kaimowitz, I have no quarrel with your attempting to elicit this information, but must you use as a crutch the question and answer? Why don't you just ask him with whom he consulted without using the transcript?

Now, I am going to have your question—because there was no objection to it—repeated by the reporter so that the witness can answer.

Mr. Kaimowitz: I will withdraw it.

Judge Garth: You will withdraw it?

Mr. Kaimowitz: And try to phrase it in a way that is more suitable.

Judge Garth: Withdrawn, Mr. O'Neill.

By Mr. Kaimowitz:

Q. Mr. Glancey, what contact did you have with the Legislative Reapportionment Commission?

Judge Garth: Just a moment.

Yes, Mr. O'Neill?

Mr. O'Neill: Your Honor, I make the same objection, and in order to not continually interrupt the proceedings, may I have a running objection to any question which is designed to elicit what members of the Commission or staff said to any witness and then if I may—

Judge Garth: You may have it. You may have that ruling.

Mr. O'Neill: Thank you.

Judge Garth: Yes, Miss Stone?

Miss Stone: Yes, Your Honor. I was about to make the same request, that you grant a continuing objection to any line that is designed to elicit information as to legislative procedures.

Judge Garth: You have that ruling. I caution you, on any other ground, you had better stand up and make it; otherwise, there will be no ruling.

By Mr. Kaimowitz:

Q. What contacts—

Judge Garth: Do you have your question?

By Mr. Kaimowitz:

Q. What contacts did you have with the Commission, with which members of the Commission, and what was the nature of the contact? A. No members of the Commission but with Mr. O'Donnell.

Mr. Kaimowitz: I will have to, Your Honor, go back to page 15 of the transcript which says specifically:

By Mr. Kaimowitz:

Q. For Mr. Ortiz: "That you did consult with the Commission?"

"Mr. Glancey: Absolutely, sir."

"Mr. Ortiz: And did—what was the specific role of the City Committee in terms of that process?"

Now, did you or did you not consult with the Commission? A. I spoke to Mr. O'Donnell. I did not speak to any of the Commissioners.

Q. And to your knowledge, Mr. O'Donnell is not on that Commission? A. That's correct.

Q. What prompted you to say that in fact you had had contact with the Commission.? A. Through Mr. O'Donnell.

Q. Was Mr. O'Donnell delegated in any specific way by the Democratic City Committee to carry out a certain role with regard to the Commission? A. I had asked Mr. O'Donnell to help me with the reapportionment process.

Q. In keeping with that, marked for identification which was submitted with the complaint is what we have referred to as Plan 1 which is noted as a preliminary plan, Legislative Reapportionment Plan, filed August 20, 1981, marked for identification at the moment only Plaintiff's Exhibit 5.

Judge Bechtle: That will be 6, I think.

Mr. Kaimowitz: 6, is it, Your Honor?

Judge Bechtle: I am sorry.

Judge Garth: 5.

Judge Bechtle: You are correct; it is 5.

Judge Garth: That's Preliminary Plan 1; am I correct, sir?

Mr. Kaimowitz: Preliminary Plan 1, that is correct.

Judge Garth: That has been marked for identification. Is that now in evidence? There has been no objection.

Mr. Kaimowitz: No, it is just at this point marked for identification.

Judge Garth: Very well, gentlemen.

Mr. O'Neill: I would just explain to Your Honor the exhibit is a copy of what the Secretary published and it says, "Preliminary Legislative Reapportionment Plan," in printing. Above it someone has written in hand, "Plan 1."

There was only I represent to the court one preliminary plan filed by the Commission. I know not the meaning of "Plan 1" or who put it there.

Mr. Kaimowitz: That is correct. We put it there, Your Honor, if you will.

Judge Garth: There is no problem if everybody agrees that you put it there and that it is the reapportionment plan filed August 20, 1982.

Let's proceed.

By Mr. Kaimowitz:

Q. Mr. Glancey, have you had a copy of this at least since the complaint was served upon you in this action? A. Yes, this was attached to the complaint.

Q. All right. Have you had a chance to look at that preliminary plan? A. When I read the complaint, I looked at the exhibits.

Q. All right. Are you familiar with a submission from the Democratic City Committee of any of the districts to the Commission? A. I am sorry. I don't understand your question, Mr. Kaimowitz.

Q. In other words, was there anything in writing submitted from the Democratic City Committee to the Commission in the form of a plan?

Judge Garth: Just a moment. Don't answer that question.

Miss Stone?

Miss Stone: Objection.

Judge Garth: What is your objection?

Miss Stone: My objection is that that's an incredibly ambiguous question. I object to the form of the question.

Judge Garth: That's your only objection?

Miss Stone: Yes.

Judge Garth: Do you understand the question? Would you like to have it repeated?

The Witness: Would you please repeat it?

(The question was read.)

The Witness: I don't know what "in the form of a plan" means.

Judge Garth: Next question.

By Mr. Kaimowitz:

Q. When did you first become familiar with that preliminary plan marked for identification as Plaintiff's Exhibit 5? A. When it was published.

Q. And about when was that? A. That date on here is August 20, 1982.

Q. Did that comport with your expectations as the Chairperson of the Democratic City Committee for a plan that would be presented by the Legislative Reapportionment Commission to the public?

Judge Garth: Just don't answer the question. There is an objection.

Yes, ma'am?

Miss Stone: Yes. I object to the form of the question. We are presented here with a fairly detailed, fairly complex plan for the City of Philadelphia.

Judge Garth: Don't give us any testimony. You object because of the form of the question?

Miss Stone: Yes, sir.

Judge Garth: What is the matter with the question?

Miss Stone: The question is over-broad.

Judge Garth: Do you understand the question?

The Witness: I am not sure, Your Honor.

Judge Garth: We will have it repeated.

(The question was read.)

Judge Garth: Well, now, I don't understand the question. Mr. Kaimowitz reframe your question if you will.

Mr. Kaimowitz: Again I will refer back, Your Honor, to the transcript at page 16, line 4, that states as follows—

Judge Garth: It would be helpful if you showed that copy of the transcript to the witness. He does not have it. And you may examine from there unless that is taped? Is that taped?

Judge Bechtle: It makes no difference. Mr. Dunbar can take it either way.

Judge Garth: All right.

By Mr. Kaimowitz:

Q. At page 16, the statement reads, quoting you:

"We began a program—must have been in January, maybe even in December of '80, January of '81—to put forth a plan for all of Philadelphia, both in the State House and the State Senate."

My first question to you is, what form did that plan for all of Philadelphia take? A. The form was as far as I was concerned fairly verbal. There was never any maps such as I am looking at here for Philadelphia that was ever presented to the Reapportionment Commission.

There were different work sheets with numbers of wards and populations in wards, within districts, and basically that's the form of the plan.

To answer your question, that was the form of plan.

Q. Were there any percentages for various districts with those work sheets or on those work sheets? A. Not that I recall.

Q. Were there boundaries suggested in those various districts or for those various districts? A. The boundaries were suggested by the wards and the divisions within the legislative district.

Q. Was there population data that would indicate, for example, that one district would not be 100,000 and another district 20,000? A. Yes, there was census data.

Q. There was census data? Was that census data broken down ethnically as well as by total population? A. On those particular work sheets, I don't recall. It may have been but I don't recall.

Q. On any work sheets that you developed? A. I just don't remember. If you—I don't know. If you are asking—

Q. If you will look at the bottom of page 17, you were quoted as saying, "We tried to make a plan that was reasonable, a preliminary plan that was something that would go out on the table and make a plan that was reasonable so that when we did in fact go before the Commission and had to argue the case before the Commission, we would look like we were trying to be unreasonable."

Miss Stone: Objection.

Judge Garth: Yes. What is your objection?

Miss Stone: My objection is he is misquoting the transcript.

Judge Garth: Yes. I think Miss Stone is right.

But the witness has the transcript before him, Miss Stone.

Mr. Kaimowitz: I stand corrected.

Judge Garth: It will be the transcript reference.

Do you have it, Mr. Glancey, before you?

The Witness: Yes, Your Honor.

Judge Garth: Because the last clause is, "We would not look like we were trying to be unreasonable."

What is your question?

By Mr. Kaimowitz:

Q. My question is, what form did it take, looking unreasonable? A. I believe in the context of this we were talking about the amount of seats in Philadelphia.

Q. All right. At the bottom of page 17, the interchange, if you will read it over starting from line 21. Mr. Ortiz says, "But it was the preliminary plan of"— A. Excuse me. What page are you on? What page?

Q. I am sorry. My apology. Page 18, bottom of page 18.

Judge Garth: Now, what is the question that is pending?

Mr. Kaimowitz: My question is—to try to read it correctly—

By Mr. Kaimowitz:

Q. Mr. Ortiz is quoted, "But it was the preliminary plan of"—

Your corroboration, "That's correct."

—"of the City Committee that the Freedman Commission adopted as their own."

Your response was, "Yes, with some changes, with some changes."

Was that preliminary plan marked as Plaintiff's Exhibit 5 adopted by the Commission drafted in accordance with your suggestions?

Miss Stone: Objection.

Judge Garth: Yes? What is your objection?

Miss Stone: I renew the objection I made before. It is an overly-broad stated question.

Judge Garth: Well, if the witness understands it, he may answer. Overruled.

A. Many of the suggestions that were made were encompassed in this plan, but there were not—it was not a plan that I submitted physically to the Commission. There was never a map like this. There was never, you know, this kind of formal submission.

By Mr. Kaimowitz:

Q. To your knowledge, were there any changes that would affect the outcome of this hearing? For example, was there any significant difference between what you offered concerning the Puerto Rican population in the various districts in the City of Philadelphia and what the Commission adopted?

Judge Garth: Just a moment.

Yes?

Miss Stone: I heard three questions. I don't know which one he wants the witness to answer.

Judge Garth: Yes. I will sustain the objection on that ground.

If you will ask one at a time, Mr. Kaimowitz, you will have no problem.

Mr. Kaimowitz: Okay.

By Mr. Kaimowitz:

Q. Were there any changes made by the Commission regarding your suggested offerings affecting the Hispanic population of the City of Philadelphia?

Judge Garth: Just a moment.

Yes, Miss Stone?

Miss Stone: The question assumes that Mr. Glancey admitted making offerings and I don't believe that's a fact in evidence.

Judge Garth: May I have the question read?

(The question was read.)

Judge Garth: I will sustain it on the grounds stated by Miss Stone.

You may ask another question.

Mr. Kaimowitz: Your Honor, I will go back again. The reason I think what just occurred happened was that there was a separation from the foundation which was launched in the transcript, that in fact there had been suggestions and a preliminary plan was adopted with some changes.

Judge Garth: If you want to ask the witness if he made suggestions or offerings to the Commission, ask him, because he need not have made any.

By Mr. Kaimowitz:

Q. Did you on behalf of the Democratic City Committee make offerings to the Commission concerning a preliminary plan? A. Offerings were made to Representative O'Donnell.

Q. Did those encompass the entire City of Philadelphia? A. Yes.

Q. Were you familiar at the time with the various ethnic breakdowns throughout the City of Philadelphia? A. I don't understand that question.

Q. Were you generally aware as to what percentage of blacks or what percentage of Puerto Ricans or what percentage of whites were within a given district? A. Generally.

Q. Did your suggestions to the Commission take into account those various ethnic populations, district by district, in the city?

Judge Garth: Just a moment.

Yes?

Miss Stone: I object on the grounds of ambiguity.

Judge Garth: Overruled.

You may answer the question.

A. My suggestions did.

By Mr. Kaimowitz:

Q. Did you make suggestions particularly with regard to the 180th and 179th districts? A. I am sure there were but, you

know, I don't remember the numbers as being specifically important.

Q. Do you recall what the maximum percentage of Hispanics were in the City of Philadelphia for any district in which you made suggestions to the Commission? A. No, I don't.

Q. Could it have exceeded 40 per cent?

Judge Garth: Yes, you are objecting?
Miss Stone: Yes.
Judge Garth: I will sustain it.
Mr. Kaimowitz: I will withdraw the question.

By Mr. Kaimowitz:

Q. Okay. On page 19, starting with line 5, Mr. Ortiz asks you, "And that plan, that plan, your plan of the Democratic City Committee, totally excluded any chance of"—

"You could be right; that's right."

—"having a Puerto Rican elected to any seat in the House of Representatives?"

You respond, "Diffuse the population; there's no question about it."

Would you amplify what you meant by "diffusing the Puerto Rican population"? A. Well, I believe in the preliminary plan there was no one district that had 80 per cent Hispanic population.

Q. Was there one with 50 per cent? A. No, I don't believe so.

Q. Was there one with 10 per cent?

What rough percentage guidelines— A. I don't know.

Q. What percentage guidelines—

Judge Garth: Wait a minute. Do you want an answer to your question?
Mr. Kaimowitz: Yes, Your Honor.
Judge Garth: Ask one question at a time, sir.

A. I don't know about the 10 per cent.

By Mr. Kaimowitz:

Q. Would you know if it were possible whether the 180th district had no more than 20 per cent Hispanic?

Judge Garth: Yes, just a moment.
Yes, ma'am?
Miss Stone: I believe that the witness has answered that question.
Judge Garth: Well, he may have, but I will let him answer it again. Overruled.

A. I don't know the specific percentage in the 180th.

By Mr. Kaimowitz:

Q. Okay. On page 20, starting with line 8, Mr. Ortiz says, "Let me get this. Hold it. Let me get this. What you are saying is that you left out the Puerto Rican community on purpose?"

"Mr. Glancey: In the preliminary plan."
"Mr. Ortiz: In the preliminary plan?"
"Mr. Glancey: Yes, oh, yes."

What did you mean by your, "yes, oh, yes," indicating that you left out the Puerto Rican community on purpose in the preliminary plan? A. Well, I think I was explaining that on page 19 and into the top of page 20.
Q. Would you try to explain that here? A. May I read?

Judge Bechtle: Do you stand on that explanation as your explanation today?
The Witness: Yes.
Judge Bechtle: That's your explanation?
The Witness: Yes.
Judge Bechtle: All right.
Judge Garth: Very well.
Judge Bechtle: It need not be read.

By Mr. Kaimowitz:

Q. At the bottom of page 20: "And you did this"—quoting Mr. Ortiz—"And you did this so that there could be an outcry from the Puerto Rican community?"

> "Mr. Glancey: Yes, yes, because it was a ripple effect all throughout the city once those"—

What did you mean by agreeing that there woud be an outcry in the Puerto Rican community? A. Again, sir, in my explanation at the top of page—or the bottom of page 19 and the top of page 20.

Q. And that's what you stand with with regard to responding to that question? A. Yes. It's in the same context, yes.

Q. Did you ever suggest that you kept the numbers for Hispanics particularly low so that you could do some horse trading on their behalf later? A. Yes, I did.

Q. And in what context was that? A. I'm not sure I understand what you mean by "what context."

Q. Well, when did you and to whom did you allude to the fact that there would be some horse trading on behalf of the Puerto Ricans later? A. It was my understanding that if there were a district that diffused the Hispanic population that the Reapportionment Commission would never pass that as a final plan, which they did not.

Q. Why offer it in that form at all? Presumably—

I am sorry. Why offer it in that form at all? A Well, I have to think back. There was some political suggestions. The concern was that the incumbent Republican legislators in the Northeast—that we attempt at least to add some Democratic population to those districts in the northeastern part of the City and in doing such, there was a ripple effect throughout the City any time you change any of the numbers. And basically that's what happened. I think the ripple effect went down and obviously affected not only the 180th but many of the districts surrounding.

Q. With whom did you horse trade about the Hispanic population after the preliminary plan? A. Okay. There was

never any specific horse trading with me and any member of the Commission. There was never any specific horse trading with myself or any member of the Republican party.

Q. Then with whom was the horse trading conducted? A. It was simply because the plan had—this preliminary plan had—in Districts 176, 174, 169, 170, and 173, and 172, a great many Democrats, more Democrats than were there before, and once that was out on the table, so to speak, there were changes from—you know, from those districts. But that was the extent of the horse trading.

Q. Did the Democratic City Committee after the publication of the preliminary plan make subsequent changes to enlarge the Hispanic population in any given district? A. I think—

Miss Stone: Objection.
Judge Garth: Yes? What is your objection?
Miss Stone: The question is ambiguous and confusing.
Judge Garth: On that ground I will overrule it.

A. The Democratic City Committee did not.

Judge Garth: Next question?

By Mr. Kaimowitz:

Q. Okay. What are you by profession, Mr. Glancey? A. An attorney.

Q. An attorney? How long have you been a member of the bar? A. Since 1977.

Q. Does any of your practice involve Constitutional law or Constitutional practices? A. Not for the most part.

Q. Okay. On page 21 of the transcript, you were quoted as saying that the preliminary plan, Plaintiff's Exhibit 5, you knew would not stand Constitutionally. You say, "Oh, yes," for that.

In what way did you believe it would not stand up Constitutionally? A. That it was my opinion.

Q. With regard to gerrymandering? With regard to dilution of minority voting strength? In what regard would it not stand

up Constitutionally? A. Can I just read this, because I am not quite sure?

Q. Sure.

Mr. O'Neill: On what page is the witness reading, please?

Judge Garth: I don't know. He hasn't told us, Mr. O'Neill. You will have an opportunity to find out.

Mr. O'Neill: I though I might read it at the same time so as not to waste the courts' time.

Judge Garth: Well, the witness has just said he wanted to read portions of the transcript before he answered and Mr. Kaimowitz assents to that. If you want to find out the page, you ask him on cross.

A. I believed that it was on diffusion of vote when I am reading this. I think that was my reason. But as I indicate, I am not a Constitutional scholar.

By Mr. Kaimowitz:

Q. Was there any other ethnic population which was horse-traded in the process of developing a final plan by the Commission to your knowledge? A. Not to my knowledge.

Q. Only the Hispanic population?

Miss Stone: Objection.

Judge Garth: Yes? What is your objection?

Miss Stone: Again it is assuming a fact not in evidence.

Judge Garth: I am going to let the witness answer that question.

Could we have the question read, please?

(The question was read.)

A. And in my answer previously I talked about the Northeast really being where it was being horse traded.

Mr. Kaimowitz: We have no further questions of this witness at this time, Your Honor.

Judge Garth: Very well.
Miss Stone?
Miss Stone: Just a few questions, Your Honor.

Cross Examination by Miss Stone:

Q. Mr. Glancey, you referred in your direct testimony to portions of the transcript in which there is mention made of a preliminary plan. Did you in your capacity as Chairman of the Democratic City Committee of Philadelphia ever participate in any sessions of the Legislative Reapportionment Commission while they were considering either a preliminary plan or a final plan for reapportionment? A. No.

Q. Did the Committee ever submit a plan to the Legislative Reapportionment Commission? A. No.

Q. Did the Committee have any control over the formulation of the final plan by the Legislative Reapportionment Commission? A. No.

Miss Stone: No further questions.
Judge Garth: Mr. O'Neill?
Mr. O'Neill: I have no questions.
Judge Garth: Mr. Knorr?
Mr. Knorr: No questions, Your Honor.
Judge Garth: Redirect?
Mr. Kaimowitz: Your Honor, just very briefly.

We at this time would move the admission of what we have referred to as Plan 1 or the Preliminary Plan as Exhibit 5, Plaintiff's Exhibit 5.

In fact, at this time to expedite matters, we would like to offer all four plans which counsel for all parties have had ample time to see, each respectively as an offering by plaintiffs.

Judge Garth: Now, as I understand it at the moment, Plaintiff's Exhibit 5 for identification is being offered first in evidence. It has not been in evidence.

Is there any objection to that?

Mr. O'Neill: I am sorry. I am not clear what the exhibit consists of. Has more than one plan been marked?

Judge Garth: No, Mr. O'Neill, I am breaking it down. P-5 has been marked for identification only and that is the preliminary legislative reapportionment plan filed August 20, 1982. Mr. Kaimowitz is offering it in evidence as P-5.

Mr. O'Neill: No objection.

Judge Garth: Do you have any objection, Miss Stone?

Miss Stone: No, sir.

Judge Garth: Mr. Knorr?

Mr. Knorr: No, Your Honor.

Judge Garth: P-5 will be marked in evidence.

Next, Mr. Kaimowitz?

Mr. Kaimowitz: I would like to expedite matters.

Judge Garth: Offer them one at a time so the clerk can mark them.

Mr. Kaimowitz: The next plan, which is called The Philadelphia Wards Outline Map at the top, which has certain districts marked on it, we would like to offer as Plaintiff's Exhibit 6.

Judge Garth: Is that the one that is marked Plan 2 at the bottom?

Mr. Kaimowitz: The one that is marked Plan 2 at the bottom.

Judge Garth: Any objection?

Mr. O'Neill: I don't believe the plan has been identified. Therefore, I object on that ground.

Judge Garth: Very well.

You will have to withhold it until it is identified.

Judge Luongo: Was it identified by Mr. Mahoney? Mr. Mahoney referred to it.

Mr. Kaimowitz: That's right.

Judge Garth: Mr. Mahoney did, and it has been marked P-3 for identification or perhaps in evidence.

Mr. O'Neill: I think it was, Your Honor. As a matter of fact, I withdraw my objection.

Judge Luongo: It was P-3.

Mr. O'Neill: Thank you, Your Honor.

Judge Garth: Any objection?

Miss Stone: It is not in evidence?

Judge Garth: It is being offered in evidence as P-3 if it has not heretofore been marked in evidence.

Miss Stone: Yes, I do object on the grounds of relevancy.

Judge Garth: I will overrule that objection.

Mr. Knorr?

Mr. Knorr: No, Your Honor.

Judge Garth: Very well, then. We will have P-3 marked in evidence if it has not already been marked in evidence.

Mr. Kaimowitz: And finally the final plan designated Plan 3 in our presentation as Plaintiff's Exhibit 7, I believe we are up to.

Judge Luongo: You withdrew 6. That was P-3. You withdrew 6 because that had been marked P-3.

Mr. Kaimowitz: Then Plaintiff's Exhibit 6.

Mr. O'Neill: No objection.

Judge Garth: That is the plan for the record which is marked in handwriting "Plan 3." It is the final legislative reapportionment plan filed October 13, 1981; am I correct? That would be marked P-6 in evidence.

Mr. Kaimowitz, you mentioned that you wanted Plan 4?

Mr. Kaimowitz: No, we are not offering Plan 4 at this time.

Judge Garth: Very well.

Mr. Kaimowitz: And we have no further questions of this witness, Your Honor.

Judge Garth: Mr. O'Neill?

Mr. O'Neill: No questions, Your Honor.

Mr. Knorr: No, Your Honor.

Judge Garth: Very well. You may step down, thank you.

Your next witness, Mr. Ortiz?

Mr. Kaimowitz: We would like to call at this time Robert O'Donnell, Your Honor.

Mr. O'Neill: Your Honor, if I may suggest, since Mr. O'Donnell is also represented by Miss Stone, the same arrangement on objections—

Judge Garth: Thank you very much, Mr. O'Neill.

ROBERT O'DONNELL, sworn.

Direct Examination

Judge Garth: Mr. Kaimowitz, Judge Bechtle has previously ruled in a related context that matters arising out of the legislative duties of this witness are privileged. Those that arise out of any political context, however, are not.

The panel has affirmed that ruling. It is now a ruling of the panel, not just a single judge, and I would ask you to respect it because we believe that it obtains here as well. Do you understand that, sir?

Mr. Kaimowitz: Yes, I do, Your Honor.

Judge Garth: Very well. Thank you.

Mr. Kaimowitz: I will try to be as specific as I can to make that distinction because—

Judge Garth: I thought it would help your examination, rather than being interrupted unnecessarily.

Mr. Kaimowitz: Thank you. I appreciate that, Your Honor.

By Mr. Kaimowitz:

Q. Mr. O'Donnell, would you state your name for the record, please? A. Robert O'Donnell.

Q. And your address, please? A. My business address is 3425 Conrad Street, Philadelphia.

Q. And by profession you are—? A. I am a legislator.

Q. Are you also a member of the bar of the State of Pennsylvania? A. Yes.

Q. And for how long have you been in that capacity? A. I have been a member of the bar since 1969.

Q. And with the State Legislature for how long? A. Since 1974.

Q. And are you a member of the Democratic City Committee? A. No.

Q. Have you been consulted by the Democratic City Committee with regard to legislative reapportionment? A. The

Democratic City Committee is an organization composed of 69 members, some of whom have had conversation with me and some of whom have not.

Q. Were you the Mr. O'Donnell identified moments ago by Mr. Glancey in the court room with whom he had conversations concerning the legislative reapportionment plan? A. I have had conversations with Mr. Glancey concerning the reapportionment plan.

Q. I would ask again if the witness would respond to my question: Were you the Mr. O'Donnell to your knowledge who Mr. Glancey referred to moments ago in this court room? A. I assume.

Q. Did you work on a plan for legislative reapportionment for the City of Philadelphia on behalf of the Democratic Party?

Judge Garth: Just a moment, sir.

Miss Stone: Your Honor, I am going to object on the legislative immunity ground with regard to that question.

Judge Garth: I think that what Miss Stone is saying is, in what capacity did he work if indeed he did work?

Mr. Kaimowitz: I think my question was first, did he work?

Judge Garth: I think you are going to have to preface it—and I suggest that you do; you obviously don't have to if you don't want—

Mr. Kaimowitz: I understand, Your Honor.

Judge Garth: —by something other than in a legislative capacity.

That's the ground of your objection, is it not, Miss Stone? Did I anticipate you correctly?

Miss Stone: Yes, Your Honor.

Judge Garth: Very well.

By Mr. Kaimowitz:

Q. At any time in your legislative capacity, were you consulted about a legislative reapportionment plan? A. Yes.

Q. Were you ever consulted outside of your legislative capacity about a reapportionment plan? A. In my judgment, no.

Q. In your judgment all of the conversations you had with Mr. Glancey were in your legislative capacity? A. Yes.

Q. Would you describe that legislative capacity with regard to your conversations with Mr. Glancey?

Judge Garth: Yes, Ma'am?

Miss Stone: I believe Mr. O'Donnell has asserted his legislative privilege and I don't see how any further elaboration on that could preserve the privilege.

Judge Garth: Would you read the question, please?

(The question was read.)

Judge Garth: I think you are going to have to tell us in what way, how these conversations came about, and why you consider them to be in your legislative capacity.

The Witness: The Democratic House member of the Reapportionment Commission was James Mandarino, and he was interested in having someone on hand who would be able to communicate with him the views of folks in Philadelphia and also information, technical and otherwise, about what the impact of the reapportionment plan would be. And I was selected as playing primarily that role.

I believe others were probably relied on, but I believe I primarily was the guy.

So Jim Mandarino in effect asked me to take on that responsibility which I did by communicating with a whole variety of people here in Philadelphia, taking that information, and putting it into his hands essentially.

That was my exercise which I understood to be legislative but—

Judge Garth: I am sorry. Just a moment, Mr. O'Neill is standing.

Yes, sir.

Mr. O'Neill: I would like to amplify the objection in view of the testimony that has just occurred. Insofar as

Mr. O'Donnell as a legislator was also acting as staff to Representative Mandarino, a member of the Commission, the immunity privilege held by Judge Bechtle and now affirmed by this court applies.

Judge Garth: Are you asking to have anything done with respect to the answer that was just made, Mr. O'Neill, or did you just inform us of that so we could be aware of that in the future?

Mr. O'Neill: I am not moving to strike the answer.

Judge Garth: That's what I thought.

Mr. O'Neill: If Your Honor please, on the basis of the answer, I think I am joining in the objection previously made but adding a ground which is peculiar to the Commission, my client.

Judge Garth: Very well.

Mr. Kaimowitz: I believe perhaps only one further question will clarify it.

By Mr. Kaimowitz:

Q. Are you claiming to have been in fact in the employ of Mr. Mandarino, a member of the Commission? A. My understanding of the word "employ" has several facets, and if you are asking, could he hire and fire me, the answer is no, he could not hire and fire me as a legislator. If you are asking me, was I in his employ in the sense of controlling my behavior, the answer is, within limits. If you are asking, was I in his employ in the sense of his being able to withdraw the designation of me as the person that communicated with him as from Philadelphia, the answer is yes.

Q. Was it known in that sense, the last sense that you used it, to prominent Democrats that you in fact were the funnel to Mr. Mandarino on the Commission?

Judge Garth: Sustained. Miss Stone stood, and I gathered she was objecting to your question. I sustained it.

Mr. Kaimowitz: I have no further questions of this witness but would like to briefly recall Mr. Glancey who is still in the court room.

Judge Garth: After this witness—

Judge Luongo: I think perhaps you can cure the last problem: Did he make known to these Democrats that that was the role he was performing? You can ask him that way.

Mr. Kaimowitz: I will try that way. Thank you, Your Honor.

Judge Garth: The other way, it wouldn't work, Mr. Kaimowitz; I assure you.

By Mr. Kaimowitz:

Q. Did you make known to your fellow Democrats that you were in fact in some capacity working for Mr. Mandarino and the Commission? A. I made known to many Democrats that I would receive on behalf of Mr. Mandarino communications from them about their preferences on the reapportionment plan in Philly.

Q. Did that include Mr. Glancey? A. Yes.

Mr. Kaimowitz: I have no further questions of this witness at this time.

Judge Garth: Very well.

Miss Stone?

Miss Stone: No questions.

Mr. O'Neill: No questions, Your Honor.

Mr. Knorr: No questions.

Judge Garth: You may step down, sir.

The Witness: Thank you.

Mr. Kaimowitz: I would at this point like to recall Mr. Glancey.

DAVID GLANCEY, recalled.

Direct Examination

Judge Garth: Mr. Glancey, you have already been sworn. Your oath continues while you are on the stand, sir.

By Mr. Kaimowitz:

Q. Mr. Glancey, you have just heard Mr. O'Donnell's testimony. Is it your understanding, then, that the numbers and work sheets that you talked about earlier were in fact being given to the Commission via Mr. O'Donnell? A. No.

Q. Did you regard Mr. O'Donnell as working for Mr. Mandarino? A. I knew he was Mr. Mandarino's designee.

Q. You testified earlier that you provided information to Mr. O'Donnell; is that correct? A. Suggestions.

Q. Right. For what purpose were those suggestions provided? A. Well, because I'm—

Miss Stone: Objection.

Judge Garth: Yes?

Miss Stone: Asked and answered, Your Honor.

Judge Garth: I am sorry; I can't hear you, Miss Stone.

Miss Stone: I am sorry. The question has been asked several times previously and answered by this witness.

Judge Garth: Well, we will have it one more time. Would you ask the question again, please?

(The question was read.)

A. So that the Commission would know the feelings of the people in Philadelphia, some people in Philadelphia.

By Mr. Kaimowitz:

Q. Okay. Did Mr. O'Donnell to your knowledge in fact act on behalf of the City Democratic Party or the Democratic leadership? A. Mr. O'Donnell—I make suggestions to Mr. O'Donnell on behalf of myself as Chairman of the party.

Q. All right. I refer again to Plaintiff's Exhibit No. 4, now at page 15, starting with the line—and I will have you read it to yourself but I believe everybody concerned now has copies—with Mr. Ortiz's question, "What was the role of the City Committee," down through the conclusion of your answer on page 16 through the word "Senate." A. Yes.

Q. Mr. Glancey, to your mind was Mr. O'Donnell acting for the Democratic City Committee, Mr. Mandarino, or both? A. I'm sure he was acting for both.

Q. At all times in both capacities? A. I don't know.

Mr. Kaimowitz: Your Honor, I think we're caught in rather a paradox. I have no further questions of this witness but I would say that in some way we have to break the logjam. I cannot move into Mr. O'Donnell's mind but what is happening now is he is simply claiming legislative capacity to cover acts—

Judge Garth: No, Mr. Kaimowitz, I will hear you and the court will hear you on any motions that you may have but if you have concluded your examination with this witness, I am going to offer him to your adversary. If you have not concluded, I will permit you, of course, to continue. And I will hear any motion after this witness leaves the stand.

Mr. Kaimowitz: I have no further questions of this witness.

Judge Garth: Very well. Do you have any questions, Miss Stone?

Miss Stone: No, Your Honor.

Judge Garth: Mr. O'Neill?

Mr. O'Neill: No questions, Your Honor.

Judge Garth: Mr. Knorr?

Mr. Knorr: No, Your Honor.

Judge Garth: You may step down. Remain in the court room if you will, though.

The Witness: Yes.

Judge Garth: Now, Mr. Kaimowitz, we'll hear you.

Mr. Kaimowitz: Your Honor, at this point in light of the testimony of Mr. Glancey and of Mr. O'Donnell, I would suggest that it is clear that to at least some extent, Mr. O'Donnell is hiding behind a legislative capacity to cover other work that would not be covered by any legislative

privilege and that there is at least in Mr. Glancey's mind a mixed role that Mr. O'Donnell played.

This three-judge panel already has ruled that in fact Mr. O'Donnell is protected by legislative capacity. To some degree it seems to me to advance and enlighten this courts' understanding of what took place, we have to come to some understanding of how far his legislative capacity extends. In other words, we know he is a legislator. We know he has other roles. He is now claiming for any question we have asked he is covered by legislative capacity. So at this point we are asking the court to specifically direct what it means by "legislative capacity," in light of what it has heard this afternoon.

Judge Garth: Mr. Kaimowitz; I will speak only for myself for the moment, but the court will confer on your application. We have not restricted your examination of Mr. O'Donnell and I do not recall him claiming legislative immunity himself. And the ground rules have been laid at the beginning of his examination.

Mr. Kaimowitz: That's correct.

Judge Garth: If you desire to ask him additional questions, Mr. O'Donnell I see is still in the court room. If you will wait just a moment, however, I will—

Judge Luongo: Before we consult, I would just like to ask you, would it make a difference if Mr. Glancey had appeared before the Commission and submitted to the Commission the raw data or whatever data he gave to Mr. O'Donnell? Could we then inquire of the members of the Commission what weight they gave to that information and how they considered it?

Mr. Kaimowitz: I am sorry? What weight they gave to the information?

Judge Luongo: Yes, in what manner they considered whatever information he submitted? Could we inquire of any of the members of the Commission?

Mr. Kaimowitz: In light of this panel's ruling on legislative capacity, my answer to that would be no.

Judge Garth: Exactly.

Mr. Kaimowitz: And I am not trying to inquire of Mr. O'Donnell as to what even at this point his intent is because I think in light of the cases of Mobil versus Bolden and McMillan v. Escambia County, Florida, the question of intent in the light that we're trying to show it is not dependent on anybody's state of mind but on their actions.

What I am suggesting has occurred here, however, Your Honor, is that we have a gentleman who is in fact a state legislator, who was asked by the Democratic City Committee on the one hand to provide certain information to the Commission, i.e., to Mr. Mandarino, and on the other hand in between I would suggest there are two different roles:

For example, as we tried to bring out with both the transcript and Mr. Glancey, what was the intent of the Democratic City Committee in diffusing the Puerto Rican population. That's very different.

Judge Luongo: The thrust of my question was simply to say in effect may we not for this purpose simply assume that whatever Mr. Glancey told Mr. O'Donnell was transmitted to the Commission? Does it make any difference?

Mr. Kaimowitz: I would agree that everything was in fact transmitted to the Commission and that Mr. O'Donnell—

Judge Luongo: And doesn't that end the inquiry? Can we go any further than that?

Mr. Kaimowitz: Yes, Your Honor, because what I am suggesting is that if I plan strategy, if two of us agree about certain information and how we're going to present it, until I bring that information back to Mr. Mandarino, even by this court's ruling, it is in no way protected.

In other words, if you and I get together and say we are not going to give the Hispanics a chance at all, and Bob O'Donnell says, "Yes, that's right, Dave Glancey, you and I agree to that; I'll let Mr. Mandarino know that that's what our position is," our position being that of the

Democratic City Committee, there is no way I believe that is covered by the legislative capacity that Mr. O'Donnell claims, and I am suggesting that distinction as to where along the line the legislative capacity role takes place, is what I am asking this panel to rule on.

Judge Garth: Mr. Kaimowitz, we have heard your eloquent plea, but I am not at all sure that I understand precisely what you are moving the panel to do. If you would tell me what it is, how you characterize your motion, if indeed that is what it is, I will rule upon it.

Mr. Kaimowitz: Very simply, conversations with David Glancey and preparation of work sheets and numbers that Mr. Glancey alluded to I would ask that this panel rule is not covered by legislative privilege.

Judge Garth: We have permitted Mr. Glancey to testify without any privilege, so I don't understand your motion. I think the transcript is clear that Mr. Glancey has testified and has answered all of your questions about what he did and with whom he did it.

Mr. Kaimowitz: Agreed, and What I am suggesting is he did it mostly according to Mr. Glancey's testimony with Mr. O'Donnell. We would like—

Judge Garth: Now, what is you motion, Mr. Kaimowitz? I want to know what your motion is.

Mr. Kaimowitz: My motion is to rule that Mr. O'Donnell has to testify to his knowledge of those conversations and what took place between him and Mr. Glancey concerning particularly the City of Philadelphia and the development of lines for the City of Philadelphia.

Judge Garth: I will not make Mr. O'Donnell testify to anything that would infringe his legislative immunity, but inasmuch as I cannot determine that, nor can the panel, in general but only on a question by question basis, you have the privilege of recalling Mr. O'Donnell if you so desire.

Mr. Kaimowitz: I do so.

Judge Garth: Mr. O'Donnell, you will resume the same.

ROBERT O'DONNELL, recalled.

The Witness: Thank you.

Judge Garth: You are still under oath. The oath continues, sir.

The Witness: Yes, sir.

Direct Examination By Mr. Kaimowitz:

Q. Mr. O'Donnell, before a preliminary plan was drafted by the Democrats for submission to the State Legislative Reapportionment Commission, did you have conversations with Mr. Glancey concerning submission of data for the preliminary plan to the Commission?

Judge Garth: Just a moment. What is your objection, Miss Stone?

Miss Stone: I am not sure.

Judge Garth: If you are not sure, we can't rule.

Miss Stone: I am not sure if Mr. Kaimowitz is misquoting Mr. O'Donnell or Mr. Glancey, but he is certainly misrepresenting the fact that the plan was submitted to the Commission is in evidence.

Judge Garth: We will have the question read.

(The question was read.)

Judge Garth: I am going to let the witness answer the question, Miss Stone. Overruled.

A. The Democrats, whoever they may be, to the best of my knowledge formulated no plan, which is the first clause of your question, after which event, which did not occur, I am supposed to answer about having a conversation with Dave Glancey.

By Mr. Kaimowitz:

Q. Did you have any conversations with David Glancey prior to the submission of a preliminary plan to the Legislative

Reapportionment Commission concerning the 180th District? A. Submission by whom?

Judge Garth: I think, as you know, Mr. O'Donnell, witnesses do not ask counsel questions; it works the other way.

The Witness: Excuse me.

Judge Garth: But I gather what he is telling you, Mr. Kaimowitz, is that he doesn't understand the question. While I will not rule on it, I think that it might be better if you clarified it so the record could be of help to us.

By Mr. Kaimowitz:

Q. Are you familiar with a preliminary plan that was issued by the Legislative Reapportionment Commission in August of 1981? A. Yes, sir.

Q. Are you familiar with any of the ethnic and racial data concerning the 180th District within that plan? A. As of now, yes, sir.

Q. At that time? A. No, sir.

Q. Did you ever have a conversation with Mr. Mahoney about the 180th District at any time? A. No, sir. Excuse me, about the 180th District, we had a conversation which touched on that, although that was not the subject of the conversation.

Q. Did you have a conversation with Mr. Ortiz, counsel here, concerning the 180th District? A. We talked about a district. It was not discussed in terms of the 180th.

Q. Okay. Did you ever discuss relative percentages of Hispanics or Puerto Ricans within any given legislative district, proposed legislative district?

Mr. O'Neill: Objection.

Miss Stone: Objection.

Mr. O'Neill: With whom?

Judge Garth: All right. I will hear Miss Stone first.

Miss Stone: The term "relative to" is ambiguous. I would ask that he restate the question, rephrase the question.

Judge Garth: I will overrule the objection on the ground that you have stated.

Mr. O'Neill, you had an objection?

Mr. O'Neill: Yes. The question was, did the witness ever discuss a subject. I suggest that question is vague unless it is tied into, "Did he discuss it with X?"

Judge Garth: This witness is a very knowledgeable individual. If he doesn't understand the question, he will tell us. So I will overrule your objection.

Mr. Dunbar, would you read the question?

(The question was read.)

A. Yes.

By Mr. Kaimowitz:

Q. With Mr. Glancey? A. Yes.

Q. Did you prepare any work sheet for Mr. Glancey concerning the Hispanic make-up of a district in the City of Philadelphia? A. No.

Q. Did he present you with any work sheets concerning the Hispanic make-up of any district in the City of Philadelphia? A. No.

Q. What was the general nature of your discussion with Mr. Glancey concerning the Hispanic population in the City of Philadelphia? A. To the best of my knowledge, the general nature of it was that he agreed there ought to be a—quote—Spanish District.

Q. Do you recall when that conversation took place approximately, that is, in relation to the plans we are talking about? A. Sometime between the adoption of the preliminary and the final plan by the Commission.

Q. Did you ever have any discussion with Mr. Glancey concerning an Hispanic District prior to the creation of a preliminary plan? A. No.

Q. You are saying after that it was represented to you by Mr. Glancey as far as you know that there should be a majority Hispanic District; is that correct? A. I did not make such representation, I think.

Q. What was the nature of your conversation with Mr. Ortiz concerning the Hispanic population? A. Mr. Ortiz proposed that there be a Spanish District of certain percentage—the number escapes me—but he was either talking about 54 or 56 per cent. And my response to him was, "Well, is that the maximum? Is that the maximum that you could possibly get?"

And his response was, "Yes, it is."

And I said, "Well, what's the minimum that's really acceptable in the Spanish community as a Spanish District?"

And he said, "56 per cent."

And I tried to sort that out and asked him, "Well, is there any other position, because there is going to be a lot of communications, a lot of interests that are going to be accommodated."

He indicated, "No, 56 per cent."

After that, he had suggested a meeting and I was—the phone call was made from a meeting on that subject at which he didn't show up. And that was the end of that.

Q. Did you let him know at any time that you were working for Mr. Mandarino, that is, for the Commission? A. No.

Q. What was the nature of your conversation with Mr. Mahoney concerning the Hispanic District? A. None.

Q. Did You let him know at any time that you were working for Mr. Mandarino? A. Within—by using the word "work," I assume you are referring back to your earlier question, and in that context my answer to that is yes.

Mr. Kaimowitz: No further questions.

Judge Garth: Miss Stone?

Miss Stone: No questions, Your Honor.

Mr. O'Neill: No questions, Your Honor.

Mr. Knorr: No questions, Your Honor.

Judge Garth: You may step down, sir.

The Witness: Thank you.

Judge Garth: Mr. Ortiz, Mr. Kaimowitz, do you desire Mr. O'Donnell to remain here?

Mr. Kaimowitz: Your Honor, at this point, we rest our presentation. We have submitted those exhibits which we consider relevant.

Judge Garth: Well, then, in direct answer to my question, you do not require his presence if he doesn't desire to stay; is that right?

Mr. Kaimowitz: Right, that's correct.

Judge Garth: All right.

Does the same hold true for Mr. Glancey?

Mr. Kaimowitz: Your Honor, we submitted certain documents with the complaint; that's what I am having difficulty with. I would at this point simply ask if I could get a stipulation on the newspaper articles that were submitted with the complaint, that they come in as exhibits. I would not pursue either Mr. O'Donnell or Mr. Glancey at this time.

Judge Garth: Why don't we take a five-minute recess while you consult with your friends across the aisle and we will return and perhaps you will have something for us.

Judge Bechtle: I will just say one thing.

Judge Garth: Yes.

Just one moment. Judge Bechtle would address you.

Judge Bechtle: I have the complaint here. Do you want to look at these? These are the items you mean?

Mr. Kaimowitz: We are familiar with them, I presume.

Judge Bechtle: Sure.

Judge Garth: Very well. As long as you have them, we will have a five-minute recess.

(Recess at 4:30 p.m.)

Judge Garth: Mr. Kaimowitz, have you had an agreement on your stipulation?

Mr. Kaimowitz: I am afraid, Your Honor, not. I will have to recall Mr. O'Donnell for those two questions related to the newspaper articles and then to attempt to move their admission under the exception to the hearsay rule under Rule 803.

Judge Garth: We will meet that problem after you get your answers.

Mr. O'Donnell?

ROBERT O'DONNELL, recalled.

The Court: Mr. O'Donnell, you are still under oath, sir.

The Witness: Yes, sir.

Direct Examination by Mr. Kaimowitz:

Q. Mr. O'Donnell, in an article headlined—quote—"ADA, OTHER GROUPS JOIN THE PROTEST AGAINST PA. REAPPORTIONMENT PLANS"—unquote—by Philip Lentz, of what I presume to be the Philadelphia Bulletin staff, it states as follows—quote:

"The House plan was written by State Representative O'Donnell, a Germantown Democrat, under the guidance of City Democratic Chairman David B. Glancey."

Did you in fact write the House plan referred to in that article?

Judge Garth: Yes?

Just a moment.

Yes, Miss Stone?

Miss Stone: I object on the grounds of legislative privilege.

Mr. O'Neill: I further object, if the court please, on the ground that the witness is in effect being asked whether a

statement made by someone who is not a witness, who is not a party, and isn't present in this court room, and is not under oath, as reported in the newspaper is correct or incorrect. I don't think it is a proper question.

Judge Garth: That's the whole purpose of the statement. I will overrule your objection, Mr. O'Neill.

And, Miss Stone, I think that your objection is premature. I will overrule it.

You may answer the question, sir.

One moment. I will permit that question to be answered providing you lay the foundation as to—

Strike that. I will permit the question to be answered.

You may answer the question, Mr. O'Donnell.

A. I don't know what the words "that plan" refer to.

By Mr. Kaimowitz:

Q. I am sorry; It says "the House plan." I will let you read if this clarifies for you what plan is being referred to.

Judge Garth: Yes, Mr. O'Neill?

Mr. O'Neill: At the risk of trespassing on Your Honor's patience I would point out—

Judge Garth: I have a lot of patience, Mr. O'Neill.

Mr. O'Neill: —that the plan referred to—

Judge Garth: Now, don't give the witness any hints.

Mr. O'Neill: I am not intending to. I am trying to make a legal argument which I believe to be a very important one in support of the objection that has been made before Your Honor finally rules on it.

Judge Garth: Well, all right, go ahead, Mr. O'Neill.

Mr. O'Neill: I think what Your Honor has tentatively contemplated doing is to allow a member of the legislature to testify as to whether he wrote a plan, a law, enacted by the Legislative Reapportionment Commission, and I suggest that that's—

Judge Garth: And what is wrong with that? That is a matter of fact. He either wrote it or he didn't write it. He

is not giving a statement of his motivation or his reasons or anything else. It is just a mere question of fact.

Now, I think your objection may be well taken to the next three questions, but I think to this one I am going to overrule it, Mr. O'Neill.

Mr. O'Neill: Very well, Your Honor.

A. I have reviewed the newspaper article.

Judge Garth: Yes.

A. I have reviewed the newspaper article. There is no indication about what "that plan" refers to. If "that plan" refers to the preliminary plan that was adopted by the Commission in August, my answer to the question is no.

If "that plan" refers to some other plan, as soon as that plan is identified, I'll answer yes or no to each, without waiving my—

If I might add, Your Honor, that I don't intend—

Judge Garth: There is no question pending, Mr. O'Donnell.

The Witness: Yes, sir. I just wanted to indicate to the court that I am not waiving any immunity or whatever.

Judge Garth: I understand that you are not, sir.

By Mr. Kaimowitz:

Q. Mr. O'Donnell, in regard to your response, which plans, then, did you draw if any for the House?

Judge Garth: Now, I will sustain your objection.

Miss Stone: Yes. Thank you, Your Honor.

By Mr. Kaimowitz:

Q. In an article dated August 10, 1981, from the Philadelphia News—quote: "WITH RELIGIOUS FERVOR, POLS UNITE JOB LOSS."

I had better let you see the article as well.

It is going to be the underlined quote, Your Honor, in the last column.

Judge Garth: Very well.

By Mr. Kaimowitz:

Q. And, if you would, Mr. O'Donnell, take your time as you did previously.

Judge Garth: Do we have a question pending, Mr. Kaimowitz?

Mr. Kaimowitz: Yes. My question will be of a similar nature.

Judge Garth: No, ask the question.

Mr. Kaimowitz: I am sorry.

By Mr. Kaimowitz:

Q. Do you regard yourself as the artist—I am sorry—quote—"the chief artist behind the Philadelphia drawings," the "Philadelphia drawings" having been identified previously as submissions to the preliminary plan? A. The article in question posits the existence of a plan which is incorrect, and then characterizes me as the artist.

(A), I am not an artist, and (B), the plan that is posited here did not exist ever to the best of my knowledge.

Q. Mr. O'Donnell, to either of the two newspaper articles, did you ever raise with them or with anyone else an objection as you are raising now to your characterization as either a writer or artist of a plan?

Judge Garth: Yes?

Just a moment.

Yes, Miss Stone?

Miss Stone: I object on the grounds of relevancy.

Judge Garth: I am going to permit it. Overruled.

A. To either of the articles?

By Mr. Kaimowitz:

Q. Characterizations? A. Yes.

Q. Can you state the nature of the objection and to whom it was made? A. The objection was made to Mark Manoff, the author of the Daily News article.

Judge Luongo: May I ask, Mr. Kaimowitz, does he have an obligation to ask newspaper people to retract statements that he feels are out of whole cloth?

Mr. Kaimowitz: Your Honor, had the witness answered differently, I might debate the issue. I am sorry.

Judge Luongo: I asked the question. Did he claim legislative privilege when he was quoted?

Mr. Kaimowitz: I am sorry. Right now I didn't ask anything about legislative privilege, Your Honor. All I asked is whether he individually raised an objection to the articles. He has indicated to one of those articles he in fact objected.

Judge Garth: Really, I think Judge Luongo's point is a very good one. What difference would it really make and how does it help you prove what you have to prove here? I am going to permit you to ask it because I have already ruled, but I don't know where we are going with it.

Mr. Kaimowitz: We are stopping right here, Your Honor, so we are not going anywhere.

Judge Garth: Thank you.

Mr. Kaimowitz: Thank you.

Judge Garth: Any questions?

Miss Stone: No questions.

Mr. O'Neill: No questions, Your Honor.

Mr. Knorr: No, Your Honor.

Judge Garth: You may step down.

The Witness: Thank you.

Judge Garth: Does that conclude your case, Mr. Kaimowitz?

Mr. Kaimowitz: Yes, it does.

Judge Garth: You rest, then sir?

Mr. Kaimowitz: Yes.

Judge Garth: And the defendants?

Mr. O'Neill: Your Honor, if Your Honor please, I move under Rule 41, I think it is, B, for dismissal for failure to establish a case on several grounds.

The first ground is one that has not been mentioned here today and that is that under the Supreme Court's decision in Virginia Supreme Court versus Consumers' Union.

Judge Garth: Just before you go ahead, if you could keep in mind precisely what you want to tell us, I would just like to find out where we are going and how long it is going to take us to get there, Mr. O'Neill.

In the event that this particular motion that you are making is unsuccessful, do you intend putting on evidence, sir?

Mr. O'Neill: I do not, Your Honor.

Judge Garth: Do you, Miss Stone?

Miss Stone: No, sir.

Judge Garth: Mr. Knorr?

Mr. Knorr: Yes, Your Honor. I intend to put on one witness.

Judge Garth: You would put on testimony?

Mr. Knorr: Yes, Your Honor.

Judge Garth: Mr. O'Neill, I am wondering whether at this stage inasmuch as one of your colleagues has a witness to put on the stand, if, without prejudice to the timing of your motion—

Mr. O'Neill: Yes, sir.

Judge Garth: —you would withhold it until we hear argument, which was the point that I was trying to get to.

Judge Garth: And I would rather have all of the evidence taken if we could and I gather that you have a witness in court, Mr. Knorr?

Mr. Knorr: Yes, Your Honor, he is here.

Judge Garth: All right.

Yes, Miss Stone; what is it?

Miss Stone: Your Honor, I was going to ask to join in Mr. O'Neill's motion and I would ask that your ruling apply to my client as well.

Judge Garth: It will apply to you as well and to Mr. Knorr as well. You will not be prejudiced because of the time that it is made.

Mr. Knorr, the plaintiff has rested. As the only one of the defendants who has testimony, would you be good enough to have your witness next?

Mr. Knorr: Yes, Your Honor.

Mr. Boehm, please.

Judge Garth: May I ask you as well as I have asked Mr. Ortiz to give us an offer of proof of what this witness would testify. Perhaps it might be conceded or stipulated.

Mr. Knorr: Certainly, Your Honor.

Your Honor, Mr. Boehm is an official in our State Bureau of Elections. He will testify as to the nature of the steps in the Pennsylvania election process. He will tell us where we are in that process now and what steps remain to be completed and when they have to be completed.

He will then go on to address the effects on that process of the relief the plaintiffs have requested.

Judge Garth: Do the plaintiffs have a reaction to that offer of proof other than the fact that they would want to hear it?

Mr. Kaimowitz: No, Your Honor.

Judge Garth: All right.

WILLIAM P. BOEHM, sworn.

Direct Examination By Mr. Knorr:

Q. Mr. Boehm, by whom are you employed? A. The Commonwealth of Pennsylvania, the State Bureau of Elections.

Q. How long have you been with the Bureau of Elections? A. Since 1972.

Q. Can you tell us what your duties are? A. I am a legal assistant to the Commissioner of Elections and advise him as to the contents of the State Election Code and the procedure problems.

Q. Are you familiar with the process which Pennsylvania goes through in its elections? A. Yes, I am.

Q. And there is an election scheduled for this year; is that correct? A. Yes, there is.

Q. And the primary is to be held on May 18; is that correct? A. That's correct.

Q. Can you tell us what steps in the process have so far been completed? A. Thus far—of course, there are some administrative procedure which we go into before this—but the first official action, of course, is that the Secretary of the Commonwealth notifies all of the 67 counties of the political parties which qualify in the state and the offices for which nomination petitions will be received. This was accomplished on February 16—the 13th, Tuesday prior to the primary.

Also on the 13th, Tuesday prior to the primary, the petition-filing process begins and runs three weeks until the tenth Tuesday, which was March 9th. We have received nomination petitions for the primary election, and today was the last day for candidates to file objections to those nomination petitions in the Commonwealth Court of Pennsylvania.

The court will then schedule those hearings. That's where we are at this point in time.

Q. And what will happen between now and May 18th, assuming that the process goes forward uninterrupted? A. By the first week of April—hopefully before that—the Secretary of the Commonwealth will certify the names of all candidates who have validly filed nomination petitions to the 67 counties at which point the counties will start to plan their ballots and their ballot labels for the voting machines for the primary.

Q. And then what? A. Well, absentee ballots must be prepared or must be delivered no sooner or no later, rather, than the second Tuesday prior to the primary which gives the counties about a five or six-week period to prepare those ballots, to lay them out, and to as I said program the voting machines. So—

I am sorry. Go ahead.

Q. Go ahead. I am sorry. I didn't mean to cut you off. A. In essence, then, after the first week in April, it is the

counties' responsibility and role to get the ballots prepared and to the electorate.

Q. As I am sure you are aware, the plaintiffs in this case have alleged that the districting plan for the State House of Representatives is unconstitutional and that no election should be allowed to go forward under it. Can you tell us if the election is to be held as scheduled on May 18th at what point would we have to have a new districting plan in place as a practical matter? A. Assuming—let me start over—the plan—you have to understand one thing and that is that the counties—and this would, of course, entail Philadelphia County—must get their ballots printed two weeks before the primary. If we hold—if the State or the courts would hold up that election—every minute, of course, counts—there would be great difficulty in the counties to get those ballots prepared. I don't know exactly, you know, what we are discussing here as far as a time period in a delay.

Go ahead. I am sorry.

Q. What would be the effect on the candidates? Have candidates already filed their petitions for the House race? A. Yes. As—excuse me. Go ahead.

Q. That was it. A. Assuming that the district—and I think what I hear was there would seven districts involved—those candidates—the question is, would the candidates that have already filed for those State House districts be the candidates on the primary ballot? I am assuming they will not be since the boundary may change and they may not be residents of the newly-apportioned district and therefore a new filing period would most likely have to be held.

Q. How long is the filing period normally? A. Three weeks.

Q. What about the alternative of putting back the election in Philadelphia County until a districting plan had been completed and allowing it to proceed in the other counties of the Commonwealth; is that a practical alternative? A. Would you restate—repeat the question?

(The question was read.)

A. If I understand the question correctly, you would be delaying the primary election in Philadelphia County which would mean that the election or the primary election for Governor, U.S. Senator, and the Supreme Court Justice would also be delayed which means we would have the returns of the other 66 counties in before the delayed primary election.

Q. Let me ask you another alternative: What if the election all over the Commonwealth were to go forward as scheduled except for the House seats that are at stake in Philadelphia County and we had a separate election just for those seats after a new districting plan had been drawn; what would be the effect if that was done? A. The effect there would be a financial one. To hold a special election in seven House districts would be quite costly to the people of Philadelphia.

Normally, well, the State would reimburse the counties for that. In previous years, I believe 1980, we had two special elections in Philadelphia, the 183d and the 185th Districts, which cost, I believe, about $95,000.

Mr. Knorr: I have no more questions.

Judge Bechtle: You mean each? For each of those districts?

The Witness: No, Your Honor, the 183d and the 185th combined were $96,000. I think it was $96,453.

Now, those—I believe part of the 185th was in another county, but that included 81 voting districts, precincts.

Judge Bechtle: All right.

Judge Garth: Anything else, Mr. Knorr?

Mr. Knorr: No, Your Honor, I have no more questions.

Judge Garth: Very well.

Mr. Ortiz, do you have any examination of this witness?

Mr. Ortiz: No questions.

Judge Garth: You may step down, sir.

Judge Garth: Does that conclude all of the evidence on the side of the defendants?

Mr. Knorr: It does for me, Your Honor.

Mr. O'Neill: Yes, Your Honor.

Miss Stone: Yes.

Judge Garth: All right. It seems to me that at this stage with both of you having rested insofar as evidence is concerned that it might be more orderly if the plaintiffs made their argument first and the defendant made theirs second rather than in reverse, and unless there is objection to that procedure by anyone—and I will hear you—I will ask the plaintiffs to proceed after they have answered one question as to how long they think they need.

Mr. Ortiz: Mr. Kaimowitz will make the final closing argument.

Judge Garth: Mr. Kaimowitz, how much do you think you will need to make your closing argument?

Mr. Kaimowitz: No more than fifteen or twenty minutes.

Judge Garth: Very well; you have it.

Do you have any objection to that procedure?

Mr. O'Neill: No, Your Honor. I am wondering if that was a New Jersey procedure.

Judge Luongo: That was suggested by Judge Luongo. That is a Luongo procedure.

Judge Garth: You would be surprised at some of the New Jersey procedures, Mr. O'Neill. I am not going to inflict them upon you tonight.

Mr. O'Neill: I tried a jury case before Judge Gerry and I was the defendant. He said, "Mr. O'Neill?"

Judge Garth: Well, Camden beats to a different drummer.

All right, Mr. Kaimowitz?

Mr. Kaimowitz: Your Honor, briefly.

Mr. O'Neill did perk my interest in terms of making an argument on the law that he claims has not been addressed to date, and I would at least like to know the nature of that because obviously I would reserve at least a few minutes' time and perhaps even make some effort to get whatever particular citation might be raised by Mr. O'Neill if it is a separate argument. If it is covered by any of the material heretofore, I

feel very confident to proceed. But if it is new, I would like to know.

Judge Garth: Mr. Kaimowitz, we will give you time to respond to any argument that is made.

Mr. Kaimowtiz: If I might have a moment—

(Discussion off the record at counsel table.)

Judge Garth: All right, Mr. Kaimowitz, if you will. Go ahead, sir.

Mr. Kaimowitz: Your Honor, Gabe Kaimowitz for the plaintiffs.

At this point we believe we are at the stage that a proceeding would be at if both sides had requested summary judgment in its respective favor.

In that light, anticipating that as being the likely result, we would direct as we have in our brief to this court this panel's attention to the Adickes versus Kresge standard as to how far plaintiffs have to meet the burden of going forward and at what juncture.

Judge Luongo: Mr. Kaimowitz, why would we go through that? We have heard the case and we are here on the final hearing. Why would we concern ourselves about the standard for summary judgment? We are here to decide the case.

Mr. Kaimowitz: Your Honor, at this point what I am suggesting is the defendants in fact have offered no testimony and in fact everything therefore that the plaintiffs have put forth has got to be regarded as true, that there was no contravention.

Judge Luongo: Oh, no, that's not true.

Mr. Kaimowitz: The standard I am asking the court to address, Your Honor—

Judge Luongo: You certainly cannot because credibility always is for the fact-finder. The case has been heard. We have heard all the testimony. Now, make your summation, please.

Excuse me.

Judge Garth: No, not at all; perfectly all right.

Mr. Kaimowitz: On that testimony, it is clear from the plaintiffs' perspective that what this case hinges on is the intent expressed by the Democratic City Chairperson and the effect—

not the continuing intent, but the effect—that occurred as a result of that intent being carried out.

On purpose, the Democratic City Chairperson diffused the Hispanic population in setting forth data for its use by the Legislative Reapportionment Commission. As a result, the preliminary plan submitted had no more than 20 per cent Hispanic population in any district in the State of Pennsylvania or the City of Philadelphia in particular or where it was most likely to occur, in what has for shorthand terms been called the 180th District, legislative district of Pennsylvania. And obviously we're only referring to the House area.

An intentionally diffused Hispanic population is considered in the plan submitted by Mr. Glancey. Whether it was in written form, notes, oral, becomes irrelevant. The data was sufficient for Mr. Glancey at one point as the transcript was able to note for Mr. Glancey to be able to say that in fact when, on August 20, 1982, a preliminary plan was adopted by the legislative commission it in fact comported with the general suggestions offered by the Democrats which as I indicate once again was an intent to diffuse the Hispanic population, in particular, for what Mr. Glancey acknowledged here today as well, horse trading purpose.

The district in the final plan which has been accepted as an exhibit goes up to 40 per cent Hispanic—and by "the district," I am referring to the 180th Assembly District—simply on the premise that there is no other district in the State of Pennsylvania that rises to that level of Hispanic population.

The 40 per cent might be considered reasonable were it not for testimony presented by Mr. Mahoney that went uncontroverted and it is submitted in Plan 2 which shows that the AFL-CIO at least independently of any particular Hispanic interest presented to the Commission a plan that consisted of somewhat above 53 per cent population or 54 per cent Hispanic population. While there was no indication as to what the black population was in the district, the complaint has gone uncontroverted at this point to indicate that there was a possible district in the nature of 70 per cent majority.

The reason I point to that is the fact that a rule of thumb has been developed and certainly used by the Department of Justice in other matters of roughly 65 per cent black and Hispanic in the district to be acknowledged as a district where the minority population has not been diluted.

That the Hispanic population combined with the black population achieves that only in what has been designated Plan 2 or what has been referred to here today as the AFL-CIO plan again has not been controverted. This was before the legislative commission at the time that it was considering a final plan for adoption.

In that light we also know that Mr. O'Donnell acted for a member of the Commission and received information from among other people Angel Ortiz who requested a district that would have consisted of 56 per cent Hispanic. What occurred, we do not care. What we only have to look at I suggest to the panel is the effect of simply 40 per cent Hispanic being provided in the one area, in North Central Philadelphia, of concentrations where it was possible to maximize their interest.

There was no attempt to do so, even though the Commission knew or should have known, without impugning the integrity of any individual member, that it was possible to maximize a given ethnic population in a way that has found favor with the United States Supreme Court.

We have shepardized the cases extensively, and particularly City of Mobile versus Bolden would suggest to this court that there is no case that presents any evidence of intent, of the so-called smoking gun, as it has been alluded to throughout by the backers in Congress currently with regard to renewal of the Voting Rights Act, that comes as close as the glaring example of what has commonly been referred to by the plaintiffs as the Glancey transcript and which formally has an exhibit number here.

That a majority Hispanic population could be reached and it fell considerably far more than 10 per cent of that goal is sufficient, we would suggest in light of Bolden, to meet any standard of intent both under Section 2 of the Voting Rights

Act or under the holding in City of Mobile versus Bolden, under the United States Constitution itself.

Judge Garth: Let me understand something. You are saying that whatever is disclosed by the transcript in the way of intent is therefore attributable to the Legislative Reapportionment Commission?

Mr. Kaimowitz: No, only, Your Honor, if the effects would show up as such and only if in fact the Commission were shown clearly to have knowledge of the possibility of maximizing such a district. And we're suggesting that combination in and of itself is sufficient. Otherwise, Your Honor, it would make a total mockery of the idea of having to show intent because the only other way to read the City of Mobile versus Bolden in terms of the plurality judgment would be that we would have to show not only the intent of Mr. Glancey, not only the intent of Mr. O'Donnell, not only the intent of Mr. Freedman, not only the intent of Mr. Mandarino, but of every City Commission person, that that would have to occur every single time, that you would have to show intent. You would have to have every one of those knowledgeable people coming forward and saying, "We did this on purpose," and I would suggest—

Judge Garth: It is not necessary, is it? Suppose, for instance, that there had been a plan that Mr. Glancey was referring to during the telecast, and the percentage in each of the districts was hypothetically 10 per cent. I suppose that you might, if indeed the Legislative Reapportionment Commission adopted a plan with the exact same percentages, ask us to infer from the one what the other was. Isn't that so?

Mr. Kaimowitz: Yes.

Judge Garth: That's not the case here, though, isn't that so?

Mr. Kaimowitz: That would be true, Your Honor, though again that means—and I will give the more favorable example that would not necessarily take place here and certainly existed in Escambia County, Florida, in going back historically—that if you have a given framework of 10 per cent Hispanic, let's say, and 10 percent black, and that is offered by one extremely open Ku Klux Klan, virulent anti-black legislator in some

form, and they lobby for a more moderate position, "Well, we certainly can't agree with Mr. Jones. We do not in fact condone the fact of so blatantly doing that. But, Mr. Commissioner, I think we can accomplish the same result by increasing it to 20 per cent. No skin off anybody's back. It is clear that we in fact will not endanger"—which I think is the real, material fact involved—"the particular seat of any incumbent or of any white in that area," we are safe on exactly the reasoning that His Honor has alluded to today: That kind of minor change in effect, while it would no longer be the one-to-one relationship that Your Honor suggests would be sufficient to vitiate the intent because clearly we do not express the same intent that was stated by the particular individual in question.

And I would suggest that you have to look at any balance of those numbers. I don't know if 40 per cent is too low or too high. All I am suggesting is that there are a number of witnesses—again uncontroverted—that the Commission knew or should have known that there were several plans in fact of greater number, and again uncontroverted, an admission against interest.

Mr. Paul referred to Mr. Freedman's knowledge that Mr. Ortiz had approached him and that as far as he was concerned, it was simply within the law to keep the district to 30 per cent. I would suggest if it is known in any community that a minority district can approach or exceed 65 per cent and that one ethnic minority has a possibility of having at least a majority district, to keep it reduced to 30 percent would in fact corroborate intent by which that information was funneled into the system to begin with and produce the effect that I am suggesting is what violates both the Constitution and the Voting Rights Act.

And it is that chronology, that situation of events, that we suggest indicates clearly that the Hispanic community in North Central Philadelphia in particular was entitled to a district that would grant the maximization of minority voting strength to overcome historical, blatant racism that frankly, Your Honors, as I think we all by now know and have been educated to has been found to be evident in many communities, even one as fair and as historic as the City of Philadelphia.

We have just established that with regard to the situation in New York City Council in the case of Herron versus Koch almost on point, one to one, which was the three-judge panel finding. And the DelValle case, through the Puerto Rican Legal Defense under which I and Mr. Catagena are associated, found exactly the same kind of problem within an Assembly district in the City of Chicago that exists here.

And what we are simply suggesting is, especially in light of the Secretary of the Commonwealth's position, to have this panel look at that area and come up with the most inexpensive way of redressing a clear-cut grievance so that this matter does not keep arising throughout this next decade.

Because I say that there is no way to curb what has occurred now until such time as you get a district within the City of Philadelphia. And presumably, even though Mr. O'Donnell said it can be referred to as "a district," we all know we are talking about the 180th District. That district must be made whole by maximizing the Hispanic voting strength and in fact the minority voting strength.

Thank you.

Judge Garth: Thank you, Mr. Kaimowitz.

Mr. O'Neill, are you going to lead off?

Mr. O'Neill: I suppose, yes. Thank you, Your Honor.

Judge Garth: Mr. O'Neill, how much time do you intend taking, sir? And how much time do your colleagues intend taking?

Mr. O'Neill: Well, speaking for myself, I think I can finish in five minutes.

Judge Garth: Good.

Mr. O'Neill: Plus any time that is occupied in addressing myself to questions addressed by the court. I don't know about other counsel.

Mr. Knorr: I would say about the same.

Judge Garth: Then the twenty-minute time limitation that I imposed is a good one.

Mr. O'Neill: I think so, Your Honor, yes.

Judge Garth: Good.

Mr. O'Neill: Your Honor, I will be very brief because very complete briefs have been filed which Your Honors obviously have read and you are fully on top of the issues.

I would like to say to you that speaking with some I think historical and Constitutional perspective about this process, having served as counsel to the first Commission and the second, should Your Honors agree with me that judgment should be entered for the Commission, then it would be and will be of great importance to the Constitutional process in the future as to which of the grounds that I advance you base your decision on.

By that I mean that I move to dismiss on the grounds, under the Supreme Court of Virginia v. Consumers' Union briefed in two briefs we have already filed with this court, that the Commission as a legislative body is totally and absolutely immune from suit. And if Your Honors were to agree with that submission after reading that case, then I would respectfully request that you seriously consider rendering your judgment on behalf of the Commission on that ground because I think it is of importance to the Constitutional and legislative process of reapportionment as it will go forward every ten years hence thereafter in the Commonwealth of Pennsylvania, that that proposition, if correct, be established once and for all.

The second ground which is also covered in my brief—and I will do more than state it—is that under the Constitution of Pennsylvania, the Commission is no longer in existence and therefore does not have the capacity to be sued. And that is covered in the brief.

Now, the third ground basically is that the plaintiffs have failed to make out a case on the merits. Their burden, as I understand it under Whitcomb versus Clavis and Mobile versus Bolden is to prove a purposeful discrimination and not merely that the law may operate in some way which is alleged to be discriminatory.

Now, I think the history as covered in the chronology of this is interesting, what we know of it:

There was a public hearing prior to filing of the preliminary plan at which interested parties were asked to appear before

the Commission and give testimony as to their interests. I think seven or nine witnesses did appear. No witnesses appeared, I represent to the court—and the transcript is a matter of record—who addressed himself to the concerns of the Hispanic community.

The preliminary plan was filed. I do not know what percentage of Hispanic population District No. 180 had, but plaintiffs allege in the complaint that it is 15 per cent and it has just been stated by counsel that it is 20 percent. Taking that at face value, I think everyone concedes that a change was made by the Commission in the final plan in response to the exception filed by the Hispanic group to the preliminary plan. And I would suggest to Your Honors that that was a very substantial change.

Now, as I understand the law—Beer versus The United States (and I don't think that is cited in my brief), 425 U.S. 130, and also in Whitcomb versus Chavis, which is cited in my brief—the states are not required to maximize the voting strength of minority groups. Of course, in proportion to their number in the general population, they are obliged to give careful attention to minority interests. And it seems to me the Commission did that in Philadelphia, particularly with regard to Hispanics and the change they made with the final plan.

I would suggest to Your Honor that what this commission has done is to work in effect and make a law of considerable Constitutional virtue, and an achievement that stands out by comparison to reapportionment in the other states of the Union. It is an enormous job. There was an approximate loss of population of 260,000 in Philadelphia, necessitating the loss of five seats in the House of Representatives from Philadelphia.

Obviously, reapportionment is a legislative process. As the courts have told us, being a legislative process, it is unabashedly a political process, which is why four members of the Commission are members of the Commission by virtue of their political office.

The Commission was set up in the Constitution of 1968. Its purpose was to avoid, as was observed by the Supreme Court

of Pennsylvania in Spector versus Levin in 1971, an unfair reapportionment law being enacted by a legislature then being dominated by one party or the other. And in order to avoid that, the Commission was set up by a Constitutional amendment consisting of two members from each party with a neutral chairman.

On the other hand, it was felt that while that kind of unfairness in legislative results should be avoided, there shouldn't be a deadlock which should force the Supreme Court of Pennsylvania to do the reapportionment as it had to do in 1965 and 1966, because primarily reapportionment, although thrust upon us by the Supreme Court's decision, is a legislative function and not a judicial function.

So the Commission labored long and hard. They produced population deviations which are almost miraculous. The largest Senate district deviates from the absolute mathematical ideal by .98 per cent, the smallest by .95 per cent. In the House the largest deviates by 1.43 per cent and the smallest by 1.38 per cent. But 90 per cent of the districts or more of both houses are under one per cent and most of them are under a deviation of a half of one per cent.

Now, reapportionment is a very difficult process. In my judgment, it is impossible to do it without complaints, and it is also impossible to do it without legitimate complaints, because all legitimate interests cannot be accommodated.

What is being contended for here is that it was not a permissive legislative choice to frame a district which had the effect of having a 40 per cent Hispanic population. But what is also being contended for is that it would be a proper legislative choice to have framed a district with 56 per cent.

I don't know that Your Honors really have anything available to you which would, absent some proof, which is not here, of a smoking gun, enable you to say that one of those horses, the 40 per cent horse, is clearly illegal under the Federal Constitution and the 56 per cent is not.

My final point is res judicata. I will rest that on that brief.

There was a decision by a three-judge district court in May of '73, Spector versus Levin, after the last reapportionment,

(in which I also was counsel, before Judges Aldisert, VanArtsdalen, and Green). That case held quite clearly that where a party voluntarily litigated his federal question in the state court and it was decided adversely to him, then under the rule of England versus Louisiana State Board of Medical Examiners in the United States Supreme Court, he is bound by that result when he thereafter attempts to get into the federal court, whether or not he seeks review by the Supreme Court of the United States, which was sought in that case and which has not been sought in this.

Now, that obviously depends on identity of the parties and if we had elected not to go to final hearing today but to have discovery, that obviously is one of the subjects that we would have sought discovery on.

What there is on the record with respect to identity of parties is in the brief and I will rest my cause on that.

And I would once again very respectfully, but I hope with some sense of importance and urgency, convey to Your Honors the hope that you will give careful attention for the future benefit of the Commission to the Virginia Supreme Court case.

Thank you very much.

Judge Garth: Miss Stone?

Miss Stone: Your Honors, I would first like to press our motion to dismiss on behalf of the defendants, the Committee, Glancey, and O'Donnell.

I have argued that not only have plaintiffs failed to state any claim upon which relief may be granted, but in fact they have stated no claims at all against my clients, no relief is sought from them, no relief can be provided by them, and I don't believe that this court can order them to provide any relief. They have no control over the election process, and they have no control over the adoption of another reapportionment plan. I think that this is an appropriate case for dismissal under Rule 21, misjoinder.

As to the merits of the case, I will not elaborate on Mr. O'Neill's argument. On the points raised in our brief, I do not differ from those raised in his. I would only emphasize to the court under the ruling of Mobile versus Bolden, plaintiffs'

burden here is to show discriminatory intent on the part of those who formulated the plan. It is not enough to show that a particular interest group may have made statements that could be construed as discriminatory or had urged a particular course upon the Commission. In fact I believe the testimony here clearly shows that both Mr. Glancey and Mr. O'Donnell very specifically disavowed any intent to urge the adoption of a discriminatory plan, that is, a plan that discriminates against the Hispanic community of Philadelphia.

In fact, Mr. Glancey, who is apparently the primary target of plaintiffs' case, has disclaimed any control whatsoever over the workings of the legislative reapportionment commission and I think that alone is enough to warrant dismissal of these defendants on the grounds stated in my motion.

On that I would defer to Mr. Knorr.

Judge Garth: Thank you.

Mr. Knorr?

Mr. Knorr: Your Honor, I have very little to add to Mr. O'Neill's very able summary of the situation here.

It seems to me that the plaintiffs have failed totally to bring home to the Reapportionment Commission any intent to purposefully discriminate against Hispanic voters. Their case seems to amount to the assertion that Mr. Glancey and the Democratic Committee offered a plan to the Commission which they say was conceived as a vehicle for racial discrimination.

I don't accept that that has been established, but assume that it has.

They then go on to say that the Commission knew that it was possible to draw a district which had roughly a 50 to 60 per cent Hispanic population. They published a preliminary plan. They took comments from the public, including the Hispanic community. And in the end they resolved on a district with about a 40 per cent Hispanic population. And they conclude that the Commission therefore intentionally diluted the Hispanic vote and that Mr. Glancey's alleged discriminatory purpose can be attributed to the Commission.

It seems to me that that just doesn't make any sense and I have nothing more to say.

Judge Garth: Thank you.

Mr. Kaimowitz: I will be very brief because this panel on the court has had ample opportunity to hear our position on the transcript time and time again.

But one section we did not allude to in which Mr. Glancey's mind was very clear at that point on percentages turns out to be at pages 13 and 14 of the transcript in which he describes the nature of the political process. And at the top of page 14 he made very clear that at a given point he was correcting Mr. Ortiz and knew exactly what the percentage of Hispanics was as recently as January of this year. And at the top of page 14 he does say:

"However, I do think that under the—and I will lead into probably what your next subject is—under the reapportionment plan, there is a district which will be 40 percent—a little more, but we'll say 40 per cent."

Mr. Ortiz says, "Actually, it is a little less; 39.6."

Well, Mr. Glancey's memory was much better then. He then says, "40.1 per cent now."

"Now, stop it."

"Yes, it is 40 per cent Hispanic, and I think it is an excellent opportunity," etc., etc., etc.

What I am driving at very simply is that given the testimony you have heard, given the way the baton is passed in this relay team for Mr. Glancey to Mr. O'Donnell to Mr. Mandarino, to the confused Commission, I think this Commission can be faulted only for one thing: Simply taking the best information it had and adapted to it.

The difficulty with that is that the information was defective. And by analogy, which we have alluded to in our brief the concept in the criminal area of the poisonous tree, which as we indicated to the panel has been recognized in at least one voting rights case, by comparison it is amply suitable for this case.

That is, once that tree is tainted, if there is fruit, i.e., a reapportionment plan for the City of Philadelphia that falls

from it, that is likewise poison. Nobody is to blame. Nobody is to be faulted. But the fruit is poisoned; you do not use it. The voters do not use it until that taint has been gotten rid of, until that rotten apple in the barrel, so to speak, is dispensed with. That's what other—

Judge Luongo: Mr. Kaimowitz, are you saying that if there had been public hearings by the legislative body itself rather than the Commission and a member of the Ku Klux Klan came in and said, "Please put these blacks in their place, please put these people in their place; get them out, don't give them a chance," do you mean that taints the whole tree?

Mr. Kaimowitz: Absolutely not. Because there is no way. That's like spraying poison into the air. But there is nothing to say that the poison took.

The poison clearly took here with regard to the preliminary plan. And that is the basic difference.

Thank you.

Judge Garth: Mr. Kaimowitz, don't sit down yet. I know the hour is late, but I have two questions I want to ask you.

You have not addressed the motions that have been made by your friends, and I would like to hear what you have to say about the fact that Miss Stone's clients are not in a position to do for you now what you would like to have done. Why should we not dismiss them on that basis No. 1?

And my second question is, what do you do about the immunity defense that has been raised by the legislative commission?

Will you answer those two questions for me?

Mr. Kaimowitz: Yes.

With regard to the first, we have to refer back to Mr. O'Neill's contention that the Commission is to be dismissed. It would be our reading logically that if this court were to find in plaintiffs' favor, some part of the process at the suggestion of this court or even to the reformation of the state legislative process would have to take place. In that process we do seek injunctive relief from Mr. O'Donnell and Mr. Glancey and the Democratic City Committee taking the same role that it took initially, that is, that they should be enjoined from having the

clear role that we say existed in the transcript and existed as far as Mr. Glancey's testimony was concerned and that is formally present a plan for consideration by whatever Commission sits.

Now, we can't stop suggestions in the air. But there's quite a weighty difference: That we would ask that they not be considered, and it would be an instruction, simply a declaratory judgment to the new Commission, "Don't pay attention to them," in effect.

Judge Garth: Well, now, you envisage a new commission.

Mr. Kaimowitz: Our reading would be that the intent—

Judge Garth: What I am concerned with is that let us suppose for the moment that we were persuaded by everything that you have said.

Mr. Kaimowitz: Right.

Judge Garth: Which entity in Pennsylvania could respond to what it is that you desire other than the legislature?

Mr. Kaimowitz: We would suggest the defendant legislative reapportionment commission, that if you look at Pennsylvania state law, it is very clear that, for example, a process can drag on in the Pennsylvania Supreme Court. The relief is provided within the statute that the Pennsylvania Supreme Court at that juncture can call the legislative reapportionment commission back to complete the process.

In fact, we are suggesting that there is no more illogic in this panel asking the Commission to do in fact exactly that, to clean up whatever problem has been created. And that is the most efficacious route.

Whatever relief this court might suggest would be in keeping with what this court would want. But that we have proposed in our brief as well is the most logical route to go, which is why we certainly did not agree with Mr. O'Neill, for example, that the Commission should be excluded from consideration.

Now, with regard to the Consumers' Union case, if you follow Mr. O'Neill's logic, we would never have a voting rights case. Every legislative body, every body in the United States redirected to engage in reapportionment matters would be free of responsibility under that case.

We would suggest, Your Honor, that that is not the holding of the case nor the intent of the case. What we are suggesting clearly is declaratory relief, injunctive relief, in which no one is hurt, so to speak. That is, there is no legislative immunity in that regard that would have to protect them from a particular function or duty.

Thank you.

Judge Luongo: You said we should issue an injunction against Mr. O'Donnell performing the same role he performed before by passing on tainted data.

Mr. Kaimowitz: No. I would suggest he could even work as he has suggested here today for Mr. Mandarino or whoever on the Commission, that he might work—

Judge Luongo: To what extent can we enjoin Mr. O'Donnell at all in the performance of his legislative duties?

Mr. Kaimowitz: We suggest—what we have asked this court to do is—to declare unconstitutional certain behavior and certain conduct and then to enjoin any further conduct that would be akin to that.

Thank you.

Judge Garth: The court will take the matter under advisement.

Would you adjourn the court?

(Concluded at 5:45 p.m.)

Plaintiffs' Exhibit No. 4 in Evide . Transcript of Television Interview of David Glancey by Angel Ortiz

LATINOS IN THE DELAWARE VALLEY
Show No. 2

"Puerto Rican Powerlessness"

Transcript of cassette recording in the above-entitled matter was prepared on or about January 20, 1982, by Neith D. Ecker, Registered Professional Reporter.

Host: ANGEL ORTIZ

Guest: DAVID GLANCEY

Mr. Ortiz: Buenos dias. Welcome to Latinos in the Delaware Valley.

My name is Angel Ortiz. I wil. be your host for this session.

Puerto Ricans, Latinos in general, have traditionally followed one party in this country from the years of Roosevelt to Kennedy, Johnson, New Deal, New Frontier and the Great Society. They have always automatically come forward and pulled that lever that says "Democratic Party."

Has this been an advantage? Has this action that they have taken getting them any entry into the processes, political processes in this country; or have they been taken advantage of by the Democratic Party and used in order to give power to this institution?

Puerto Rico, Puerto Ricans have traditionally voted; and every election year 90, 93 percent of the population of voting age goes out to the polls and votes. And since that year that the New Deal began, that vote has always been Democratic.

Here in Philadelphia that tradition continues. The Puerto Rican goes to the polls and pulls the lever; and the lever traditionally has been Democratic. But they do not get to pull that lever for people of their own background.

Why is that? What is the process and the doors that have been locked? How can they be opened so that this group of Latinos can gain entry into the political process?

To discuss that and the powerlessness political powerlessness, of the Latino and the Puerto Rican community in the city, we have with us David Glancey, the Chairperson of the Democratic City Committee.

And to begin, David, why have there not been more Puerto Ricans running for political office in Philadelphia?

Mr. Glancey: I guess the best way to begin is to give you kind of a historical perspective, which I'm sure you know better than I; but at least the way I view it, anyway, on how, is that I think traditionally the structure of the Party in a big city like Philadelphia and specifically in Philadelphia has been to run it like a private club almost. And I say this going back certainly into the early '50s and through the '60s. Those who were members of the institution, on the inside of the institution had a certain sense of power because during that period of time the institution and the government were pretty much one and the same thing. So if you held a responsible position in the institution, you did have power.

In fact—and as in any institution—you don't want to give up power if you have it; and you don't want to open the door because it dilutes the power of the individuals that are already there.

As it relates to, you know, Hispanics—I think it also relates to other ethnic groups, although certainly late in coming for Hispanics. And I would agree with you, it really hasn't come at all up to this point except, I think, that we hope, anyway, in the future that it is—the doors are open to a greater degree than they were 10, 15 years ago.

I think that political power is only shared by those in politics with those that can produce on Election Day, that can produce the votes.

Mr. Ortiz: But, again, let's go back as to what production is in terms of politics.

And in terms of politics, production is votes and the votes that come up. And essentially those votes within the Puerto

Rican community in Philadelphia have always gone to the Democratic Party.

So in that sense the Democratic Party hasn't had to worry about getting those votes, because traditionally the people have been Democrats; and without any effort actually you have been able to get that sector to vote.

Mr. Glancey: I think the distinction I guess, that I would draw is that it is the number, those who vote.

I right now—Philadelphia has a large Hispanic population. I don't know what the exact figure is under the new census; but—

Mr. Ortiz: 60—the census gives us a 63,000 plus figure. It gives that—the fastest-growing community in the last 10 years in Philadelphia.

Mr. Glancey: Right.

Mr. Ortiz: In fact, the only community to gain in population.

Mr. Glancey: Traditionally—and I think this has been with every minority group until they have been franchised—is that the—even though the population may be large, the voting population is not large. And I guess that's the distinction I'm making.

Mr. Ortiz: But your administration, your candidate, Bill Green, differentiated himself from Frank Rizzo when he was running. He wanted to disassociate with him—with himself from the politics of the last eight years.

And the rhetoric, at least the words that were being spoken at that time was of great reformist-type of politics, the airing-out of the clubhouse politics, the bringing in of those individuals that have been disenfranchised, the Puerto Ricans, giving more say to the blacks and in the city sharing with more progressive forces and opening up the process.

In terms of the Puerto Rican, I see here that has not—that has not occurred.

Mr. Glancey: Uh-huh.

Mr. Ortiz: In your Democratic City Committee are there any Puerto Ricans that are part of that committee, for instance?

Mr. Glancey: Are there any ward leaders, you know, basically is what you're asking.

No, there are not. Let me go back to the first part of your comment.

I do believe that there has been during the course of the last two years more of an open-door policy, more of sharing the power. Obviously two years will not undo what has taken place—I won't even say the last eight years, but certainly over the last 20 years.

Mr. Ortiz: Uh-huh.

Mr. Glancey: However, I think, you know—again, I don't think the point of your question was for me to give you a laundry list of things that are done.

Mr. Ortiz: Right.

Mr. Glancey: It is my sense, however, that both in most minority communities—and maybe not in the Hispanic community—and I think that's something we can talk about; but in most minority communities there is a certain sense that, you know, the door is no longer closed.

Now, specifically in the Hispanic community, again, I don't—the administration has to answer for itself. And I think one of the real points that I have always tried to make was that under the mayor's tenure and the administration and under my tenure in the Party, we're not one and the same anymore.

And I think it's very dangerous to have a party and government be one and the same, I really do, because I think what it does, it makes party functions interchangeable with governmental functions. And I think that has given us what some would call the history of corruption in this town.

Mr. Ortiz: But, again—

Mr. Glancey: I'm not trying to get off the point.

Mr. Ortiz: No. You can't get—you can't separate yourself because essentially you have Mayor Green—you are the Chairperson of the Democratic City Committee.

Mr. Glancey: Right.

Mr. Ortiz: But you have been appointed by Green and ratified by the ward leaders; is that the way it's done?

Mr. Glancey: He asked me to be a candidate and I won, yes.

Mr. Ortiz: So essentially you are the appointee of Bill Green.

Mr. Glancey: Representative of Bill Green.

Mr. Ortiz: Representative.

Mr. Glancey: No question about it.

Mr. Ortiz: And you may serve at his place.

Mr. Glancey: Probably.

Mr. Ortiz: Probably. So that the separation that you're trying to—

Mr. Glancey: I'm not trying to separate myself from the mayor.

Mr. Ortiz: It really—it really tries to get into very gray areas there.

Mr. Glancey: Okay, but what I'm saying, Angel, I'm not trying to separate myself from the mayor. I wouldn't do that. No. 1, I don't want to. No. 2, I agree it would be ludicrous for me to even say that.

The separation I'm trying to make is that what the Party does is not necesarily what the government does anymore. That's really the only separation I was making.

Mr. Ortiz: Again, you ran a campaign against finish—I think—

Mr. Glancey: Seems like yesterday.

Mr. Ortiz: A lot of hope—a lot of hope of a lot of progressive people within the community, particularly the Puerto Rican community, went with your candidacy up there. You had meetings with Puerto Ricans and you made certain promises to them at that point. Mayor Green made promises to the Puerto Rican community when he was going.

Again, the Democratic Party, when it ran the mayoralty campaign in the Puerto Rican community, made certain promises as to programs and as to decision-making process, the fears of influence that we know about.

And right now you can tell me, really within the administration or within the Democratic City Committee where is the Hispanic and Puerto Rican community playing a role? Has Mayor Green hired anybody to be within, let's say, his cabinet of Puerto Rican extraction? Are any Puerto Ricans running any departments within the current administration? And is

there any Puerto Ricans within the Democratic City Committee sphere that are not ward leaders, let's say, employees?

Mr. Glancey: Sure, sure. Let me speak about the Party.

No, there are no employees. I mean I only have three paid employees, and most of them are clerical.

However—they're all clerical.

One of the things—and I think we should—you know, I have a tendency to be very positive about this. And it's very important to have Hispanic candidates, okay. I'll get to that later.

I think one of the things that would be at least be symbolic is that for some input from the Hispanic community into the Democratic City Committee. And I'm sitting here talking to you. I don't think this would have taken place two years ago. I don't know, but I don't think so.

And you know as well as I, when you pick up the phone and call me, you and I converse.

No. 2, as to candidates, I think there are certainly—and more so than the Republican Party, I think the Democrats would take great pride in the fact that we were most influential in electing the first Hispanic judge in the Commonwealth of Pennsylvania.

Mr. Ortiz: He was appointed to the Commonwealth Court by a Republican governor.

Mr. Glancey: Before he was appointed to the Common Pleas Court, he was nominated by the Democratic Party to run for that office. And then he was appointed to the court during the summer after we had won the primary, the Democratic primary.

Mr. Ortiz: Was he appointed before the primary? I think he was appointed before the primary.

Mr. Glancey: I don't believe so.

Mr. Ortiz: Yes, he was.

Mr. Glancey: Was he?

Mr. Ortiz: He was appointed before the primary.

Mr. Glancey: In any respect, I—

Mr. Ortiz: Public relations—

Mr. Glancey: I will not denigrate my Republican friends on that issue.

However, I think that if the judge were asked if he were asked to run by the Democrats or the Republicans, I'm sure he'd say by the Democrats.

No. 2, which is even more important, I think—and we've had several discussions about this—is kind of ongoing political power, ongoing political representation in legislative form, in an area where you have a representative hopefully in an area that encompasses a large part of the Hispanic community.

And I know you and I will differ on certain things about this. However, I do think that under the—and I'll lead into probably what your next subject is—under the new reapportionment plan there is a district which will be 40 percent—a little more, but we'll say 40 percent—

Mr. Ortiz: Actually it's a little less, 39.6.

Mr. Glancey: 40.1 now.

Now stop it. Yes, it is.

40 percent Hispanic. And, you know, I think that it is an excellent opportunity and will be a district that will elect a Hispanic representative. And I won't say for the first time because I think back in the early '70s or the mid '60s, I guess it was, there was a Hispanic—

Mr. Ortiz: Herman Quiles, I think his name was—

Mr. Glancey: Yes, that's right. Hispanic member of the State House.

Mr. Ortiz: Right. But, again, going into that issue of the reapportionment, the City Committee was very influential in the process, was it not?

Mr. Glancey: Yes.

Mr. Ortiz: That you did consult with the Commission—

Mr. Glancey: Absolutely, sir.

Mr. Ortiz: And did—what was specifically the role of the City Committee in terms of that process?

Mr. Glancey: Okay.

Mr. Ortiz: Developing, let's say, the preliminary plan—

Mr. Glancey: That's right.

Mr. Ortiz: —that first came up.

Mr. Glancey: That's right.

Mr. Ortiz: What was the role of the City Committee?

Mr. Glancey: What we did was, myself and a member of the leadership of the State legislature from Philadelphia and—

Mr. Ortiz: That's O'Donnell?

Mr. Glancey: Bob O'Donnell, Representative O'Donnell.

(Continuing)—and three or four other technical people, I guess people who are good with numbers and understood that kind of thing.

We began a program—must have been in January, maybe even December of '80, January of '81—to put forth a plan for all of Philadelphia, both in the State House and the State Senate.

Our basis behind that was to try and maximize our minimum. We are—by that I mean—

Mr. Ortiz: Explain that.

By that you meant that you wanted to maintain those individuals that were incumbents in their seats and create safe seats for those individuals?

Mr. Glancey: No, that's not what I meant by that.

What I mean by maximizing our minimum is that we have no control of the State House, we have—when I say "we," the Democrats—have no control of the Executive Mansion and no control of the State Senate.

So if we attempted to overreach—we have 34 districts in Philadelphia now. We lost population in Philadelphia.

If we attempted to say, "Well, we should retain all 34 seats," and we'd shoot out into the suburbs various places trying to gather—

Mr. Ortiz: Constitutionally you cannot do that.

Mr. Glancey: No. You can cross county lines.

Mr. Ortiz: Yes, but only once.

Mr. Glancey: But I don't know if that's a Constitutional mandate.

Mr. Ortiz: No. That's a mandate of the Commission.

Mr. Glancey: That's right.

Mr. Ortiz: That's right.

Mr. Glancey: But, in any respect, we thought we would not overreach. We tried to make a plan that was reasonable, a preliminary plan that was something that would go out on the

table and make a plan that was reasonable so that when we did in fact go before the Commission and had to argue our case before the Commission, we would not look like we were trying to be unreasonable—

Mr. Ortiz: But that preliminary—

Mr. Glancey: That's what I mean by maximizing the minimum.

Mr. Ortiz: Okay. But that preliminary plan that you, the City Committee, created and which the Freedman Commission adopted—I mean obviously they adopted it and they put it forward as their plan.

Mr. Glancey: Well, as a preliminary plan. They've changed—

Mr. Ortiz: As a preliminary plan of the Committee.

Mr. Glancey: No.

Mr. Ortiz: Not of the Democratic City Committee.

Mr. Glancey: Just for Philadelphia.

Mr. Ortiz: Right.

Mr. Glancey: That's right.

Mr. Ortiz: But it was the preliminary plan of the—

Mr. Glancey: That's correct.

Mr. Ortiz: —of the City Committee that the Freedman Commission adopted as their own.

Mr. Glancey: Yes, with some changes, with some changes.

Mr. Ortiz: And that plan, that plan, your plan of the Democratic City Committee totally excluded any change of—

Mr. Glancey: That's right.

Mr. Ortiz: —having a Puerto Rican elected to any seat in the House of Representatives.

Mr. Glancey: Diffused the population, there's no question about it.

And one of the reasons that we did that—and I don't want to bore your viewers with all of the ramifications—is that we had certain partisan problems with the Republican Party in the northeast part of the City of Philadelphia; and we knew that the plan preliminarily, as it was going to be presented to the Freedman Commission, and when testimony was given, we knew that there would be some vociferous objections from the Hispanic community because of that.

And once that was done—and I think we've discussed this a little bit; but once that was done, the Chairman of the Reapportionment Commission was enlightened enough to say that, you know, "We've got to do something to change this."

Changing that district down—

Mr. Ortiz: Let me get this. Hold it. Let me get this.

What you're saying is that you left out the Puerto Rican community on purpose—

Mr. Glancey: In the preliminary plan.

Mr. Ortiz: —in the preliminary plan.

Mr. Glancey: Yes; oh, yes.

Mr. Ortiz: That's what you're saying.

Mr. Glancey: Sure.

Mr. Ortiz: And you did this so that there could be an outcry for the Puerto Rican community?

Mr. Glancey: Yes, yes, because it was a ripple effect all throughout the city once the—

Mr. Ortiz: So you were strategic on the part of the Democratic City Committee to come out with a plan that excludes—

Mr. Glancey: Yes, it was strategic but it wasn't callous—

Mr. Ortiz: —the largest and fastest-growing population.

Mr. Glancey: It was—oh, no. Now, Angel, I'm not saying that it was callous. It was strategic. There was no way in the world that any of us thought that the plan, preliminary plan, the way it was configured in the Hispanic community would ever be accepted by the Commission, by the Reapportionment Commission as a final plan.

For something to put on the table, sure, let's put it on the table; let's have any number of people come and—

Mr. Ortiz: Even—

Mr. Glancey: —testify.

Mr. Ortiz: Even though you then knew that Constitutionally that plan would not be able to stand.

Mr. Glancey: Oh, yes. Well, that was a plan that was not going to be final, so that, you know, at that point we were obviously, in the whole concept you're thinking about the Constitution; but on individual bases on a preliminary plan that didn't bother us.

Mr. Ortiz: Was there any objective to secure the black incumbent seats and some other incumbents in the—

Mr. Glancey: Yes, particularly the black incumbent seats.

One of the reasons was purely mathematical. The population in Philadelphia fell about 260,000 people plus or minus several thousand; and if you took the black population in the city against the entire population in the city, it would come up with, I believe, 12 or 13 black representatives. I believe it was 13—11 or 12. I'm not sure of the exact number.

So given that—and we did have 11 black incumbents, I believe—that worked out to be what the mathematical representation should be or the proportional representation should be. So there was a protection plan there.

Mr. Ortiz: But, again, if the Democratic City Committee has the purpose of opening these doors to the process—you and Bill Green came in with a great reformist zeal into our—why, strategically speaking, not from the first, why not create the district from the very beginning in the preliminary plan, create a Puerto Rican district of 40, 45 percent and then strategically negotiate upwards?

As we have now, the district that we have has 40 percent Puerto Rican, 6 percent black; and then you have the 31st Ward with all of the river wards, which they came out in force in your own election; and you well know—we all know the result of that. They are very well organized; and the Puerto Rican community is young, below voting age and a 40 percent population does not mean that 40 percent of the registered voters in that community.

How will the Democratic City Committee help to insure that a Puerto Rican, Hispanic is able to open that door and take that next step forward?

Mr. Glancey: Well, I think—

Mr. Ortiz: How will that be done?

Mr. Glancey: I think—

Mr. Ortiz: What will be the process?

Mr. Glancey: Well, the first process is let's see who the candidates are, you know. I—in that district presently there are

two incumbents. I assume those two incumbents want to stay in their seats. So I presume that both of them will be running.

I am positive that there will be a Hispanic candidate. One of the things that I would advise is that there not be more than one Hispanic candidate because of the disillusion factor that will work there; that if there is more than one Hispanic candidate in the race, what I will do personally is—of course, I haven't begun it yet because I don't know who the players are—I would sit down personally with whomever or if there is more than one preliminarily, person who wishes to run for that office, advise them to the best of my ability how I would run a race in that district; supply all of the, you know, the kind of mechanical things that are necessary, street lists, past registration figures; and then we get to the point where if there is a Hispanic candidate and there are two incumbents that are in the race, then I think we have to sit down and jawbone. And I think we have to see if the incumbents are in fact real candidates, if they're going to stay there—

Mr. Ortiz: You're talking about party endorsement.

Mr. Glancey: Yes, that's where that goes.

Mr. Ortiz: Let's go—

Mr. Glancey: That's where that goes.

Mr. Ortiz: That's what we got to talk about. We got to see whether the Democratic City Committee is really going to be the key that opens the—

Mr. Glancey: Yes.

Mr. Ortiz: —door to the political process to the Latinos.

Mr. Glancey: It is absolutely my intention to endorse a Hispanic candidate. I won't say Carte Blanche because I don't know who it is. If you are saying you were going to run, then maybe we could make a deal right here.

Mr. Ortiz: I am not running for any political office.

But essentially what we're trying to see is what is the role that the Democratic City Committee is going to be playing in the '80s, vis-a-vis the Latino and, let's say, the communities in the city that do not have power.

Mr. Glancey: It's a fair question, it really is. And I think it's one that—you know, I certainly don't have all the answers to it.

The only thing, I think, you know—it might sound very, you know, facile; but nurturing, No. 1, people who want to run for office. I mean that's basically what the Democratic City Committee should be doing, I think, recruiting candidates and winning with those candidates.

So I think the first step, finding the candidates. I think the kind of dialogue that you and I have with some other members of the Hispanic community kind—at least waters the flowers a little bit, so we can find out who is interested in running.

Mr. Ortiz: What about the city councilmen races?

Mr. Glancey: Again—

Mr. Ortiz: Again—

Mr. Glancey: 1983, I think a Hispanic would be terrific; A, running at large is probably the best—

Mr. Ortiz: Well, not—

Mr. Glancey: You know, again I'm speaking off the top of my head.

I think an endorsed Democratic candidate of—who is Hispanic running for counsel-at-large is something I'm going to strive for.

Mr. Ortiz: Uh-huh. Well, again, we—those are promises that are being made that—

Mr. Glancey: I just promised that.

Mr. Ortiz: Well . . .

We're talking about opening up a political process to people who are out and essentially powerless in this society. We're talking about two very vital areas: the City Council, which was just redistricted—and again redistricted in such a way that the Puerto Rican community was split up into different areas—

Mr. Glancey: I take no responsibility for that.

Mr. Ortiz: No.

Again, but it is the party in power; it is the Democratic Party is the party in the majority. It isn't Polish Soviets or Chinese Communists or Salvadorans or the Argentine legislature that is making these very basic decisions. It is the Democratic-controlled City Council who redistricted the city in such a way that the Puerto Rican community is split up. It is the Democratic City Committee who puts out a preliminary plan that leaves

out the Puerto Ricans, strategically, as you may well claim. It may well be true; but, again, in such a way that the struggle that is all uphill; all right? And, again, from people who have come in with a reformist zeal, Bill Green, yourself, to try to air out the doors of the clubhouse politics.

There has to be some way, because it's well taken—power is taken. Power is never shared or given. People who want to share power have to go out and get it.

Mr. Glancey: Uh-huh.

Mr. Ortiz: Within this society the Latino is finding it very, very hard, specifically in Philadelphia, culturally because of the language problem, the cultural aspects, and the aspects of the very basic situation of the economy that is happening.

So that that door, those doors that are not being opened as easily as they were or could have been a few years back. So we have to depend in many ways in people that we consider allies.

And when allies get into power and those doors are—remain locked, then you have a very basic problem. You're leaving that community very little alternative. If they do not share the power one way, they will take out the anger and hostility in other ways. And we saw that during the '60s. We saw that in Detroit, Watts, and so on. So we don't want that to happen again.

We—what I like to hear is what is the Democratic City Committee really going to be doing? because that's the beginning. I think the Democratic City Committee is a decision-making body of the Democratic body.

Where—where and when are the doors going to be opened into that community?

Mr. Glancey: Well, you know, I don't want to repeat myself; but I think one of the things that I—you know, what the Democratic Party can do is to nurture candidates and get them to run, okay? And certainly get them to win.

I have absolutely a great sense—I feel that in 1983, given—and all of this, of course, is that everybody is a good, qualified person; and I don't think that you would consider it any different.

And a candidate who wants to run for council-at-large, City Council, we'll say, on City Council at-large and really try and narrow it down of Hispanic extraction, happy to endorse that candidate. We'll search for that candidate.

And I think, you know—the question you raised before, the promises, well, you know, we joked a little bit before; but I was the first person to call Judge Diaz a while ago and say I am looking for—I want to have somebody run who is of Hispanic extraction for a judge on the bench of the Court of Common Pleas in Philadelphia. You know, I'm proud of that. And I think that that—

Mr. Ortiz: Well—

Mr. Glancey: —you know, maybe it's small--

Mr. Ortiz: David—

Mr. Glancey: —but it's a historical perspective.

Mr. Ortiz: —I think we're reaching the conclusion of our program.

We've just been talking today with Glancey, the Chairperson of the Democratic City Committee, talking about politics and talking about access into the political process.

Buenos dias. Nos pudemos. Adios. A da la proximas.

Plaintiffs' Exhibit No. 3 in Evidence:
Proposed Redistricting Plan for the
Pennsylvania State Assembly
by the AFL-CIO

Plaintiffs' Exhibit No. 5 in Evidence:
Legislative Reapportionment Commission's
Preliminary Reapportionment Plan

Plaintiffs' Exhibit No. 6 in Evidence:
Legislative Reapportionment Commission's
Final Reapportionment Plan

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CLERK

No. 82-394

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HISPANIC COALITION ON REAPPORTIONMENT, et al.,
Appellants

v.

LEGISLATIVE REAPPORTIONMENT COMMISSION, et al.,
Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION OF THE LEGISLATIVE REAPPORTIONMENT COMMISSION TO AFFIRM

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No. 39

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

HISPANIC COALITION ON REAPPORTIONMENT, et al.,
Appellants

v.

LEGISLATIVE REAPPORTIONMENT COMMISSION, et al.,
Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION OF THE LEGISLATIVE REAPPORTIONMENT COMMISSION TO AFFIRM

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, Appellee the Pennsylvania Legislative Reapportionment Commission moves to affirm on the grounds that it is manifest that the questions on which the decision of this cause depends are not novel and are so unsubstantial as not to require further argument.

STATEMENT OF THE CASE

Pursuant to the mandate of the Constitution of the Commonwealth of Pennsylvania, the Legislative Reapportionment Commission exercises all legislative power with respect to reapportioning the legislative districts of the Commonwealth.[1] Thus, the Commission is a legislative body and its members are the Commonwealth's legislators for the purpose of reapportionment. The 1981 Final Reapportionment Plan adopted by the Commission has survived numerous attacks in the Supreme Court of Pennsylvania.[2] Moreover, it has withstood the scrutiny of the three-judge court below. [A-1]. It is respectfully submitted that the instant appeal from the rulings of that court raises no novel or substantial issues which require further argument before this Court.

The Commission is in substantial agreement with the chronology of events of the 1981 reapportionment process set forth in appellants' Jurisdictional Statement.[3] The instant appeal involves the 180th House of Representatives district established by the Commission. In the preliminary plan proposed by the Commission that district contained an Hispanic population of approximately fifteen percent. [A-7]. After receiving public comment on the preliminary plan, the Commission issued its final reapportionment plan in which the Hispanic population of the 180th district was increased to approximately forty percent [A-8]. This final reapportionment plan adopted by the Commission on October 13, 1981 is now the law of the Commonwealth of Pennsylvania.

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1. PA. CONST., Art. II, §17.

2. *In re Reapportionment Plan for the Pennsylvania General Assembly filed by the Legislative Reapportionment Commission, October 13, 1981*, 442 A.2d 661 (Pa. 1981).

3. Jurisdictional Statement at pp. 5-6.

ARGUMENT

The four questions advanced for review by appellants pose essentially two issues. The first concerns the conclusions to be drawn from appellants' evidence presented at trial. The second concerns the application of legislative immunity to bar appellants' inquiry of the Commission's Chairman, James O. Freedman, and to permit limited inquiry of Representative Robert O'Donnell.

In the lower court, the Commission moved to dismiss on the ground that as a legislative body it is totally immune from suit. The lower court, however, declined to rule on the Commission's motion, reasoning that ". . . where, as here, the case on the merits is weak, such a technical defense is less important to the litigation. . . ." [A-11]. In their Jurisdictional Statement, appellants now concede that ". . . the Commission is immune from suit . . ." on the basis of this Court's decision in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980). [Jurisdictional Statement at p. 9, n.8] . Accordingly, appellee will argue in the instant Motion to Affirm only that appellants' appeal, insofar as it questions the legislative immunity afforded Commission Chairman, James O. Freedman, does not present substantial or novel issues.[4]

The Commission exists for one purpose only — to enact a law of the Commonwealth of Pennsylvania.[5] To

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4. Motions to Affirm being filed simultaneously by appellees, William R. Davis and Representative Robert O'Donnell *et al.*, will address the merits of appellants' proof at trial and the legislative immunity afforded representative O'Donnell, respectively. The Commission joins in the Motion to Affirm being filed by appellee, William R. Davis.

5. Article II, Section 17(a) of the Constitution of the Commonwealth provides:

> (a) In each year following the year of the Federal decennial census, a Legislative Reapportionment Commission shall be constituted for the purpose of reapportioning the Common-

perform this task, the Commission first files a Preliminary Plan. If no exceptions are filed, or if filed and acted upon, this plan automatically becomes final and has ". . . the force of law."[6] Otherwise, a final plan is filed from which appeal may be taken directly to the Supreme Court of Pennsylvania. After that court decides all appeals, or if no such appeals are taken, ". . . the reapportionment plan shall have the force of law . . ."[7] As such, the Commission was for all purposes a legislative body. *Supreme Court of Virginia v. Consumers Union of the United States, Inc., supra,* 446 U.S. at 734.[8]

As the Chairman of this legislative body, James O. Freedman was in all respects a legislator. In the lower court appellants sought to depose Mr. Freedman as to ". . . the considerations, the deliberations and the factors that went into the creation . . ." of the reapportionment plan. [A-27]. The lower court, finding that this proposed inquiry into the "motives" and "thought processes" of the Commission [A-42] was contrary to the legislative privilege afforded Mr. Freedman, entered a protective order barring appellants from so proceeding. [A-19 through A-48].

NOTE 5 — *(Continued)*

wealth. The commission shall act by a majority of its entire membership.

The Commission consists of the Senate Majority Leader, Senate Minority Leader, House Majority Leader, House Whip and a Chairman selected by the other four members. PA. CONST., Art. II, §17(b).

6. PA. CONST., Art. II, §17(c).

7. PA. CONST., Art. II, §17(e).

8. In that case, this Court concluded that the Supreme Court of Virginia, insofar as it promulgated rules for the Bar of Virginia, was a legislative body:

"[I]n this case the Virginia Court claims inherent power to regulate the Bar, and as the dissenting judge below indicated, the Virginia Court is exercising the State's entire legislative power with respect to regulating the Bar, and its members are the State's legislators for the purpose of issuing the Bar Code."

Appellants argue that this application of leglislative privilege to the Commission's Chairman poses novel and substantial questions that have not been addressed by this Court. To the contrary, the lower court's determination is in full accord with the letter and purpose of the privilege traditionally accorded state legislators as reflected in the pronouncements of this Court.

This Court has held that under the federal common law state legislators are entitled to absolute immunity from civil suit for actions which fall within "the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). The scope of this immunity protects against inquiry into the motivations or purposes behind a legislator's actions, for even an ". . . unworthy purpose does not destroy the privilege." *Id.* at 377. The privilege bars any inquiry ". . . into acts that occur in the regular course of the legislative process. . . ." *United States v. Brewster*, 408 U.S. 501, 525 (1972).[9]

In *Supreme Court of Virginia v. Consumers Union of the United States Inc., supra*, a consumer group filed suit against the Virginia Supreme Court pursuant to 42 U.S.C. §1983 challenging that court's disciplinary rules governing the conduct of attorneys. The Virginia Supreme Court promulgated these rules by virtue of its inherent authority to regulate and discipline attorneys and

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9. *Accord, United States v. Helstoski*, 442 U.S. 477, 489 (1979). In these cases, this Court was construing the operation of the federal Speech or Debate Clause. U.S. CONST. Art. I, §6. The Court has noted, however, that the federal common law legislative immunity announced in *Tenney v. Brandhove, supra*, has generally been equated to that accorded Congressmen under the Constitution. *Supreme Court of Virginia v. Consumers Union of the United States, Inc., supra*, 446 U.S. at 732. The principles underlying the two immunities are identical, namely, ". . . to insure that the legislative function may be performed independently without fear of outside interference." *Id.* at 731. *Accord, Sweeney v. Tucker*, 473 Pa. 493, 505, 375 A.2d 698, 703 (1977). Accordingly, the holdings of this Court with regard to the federal Speech or Debate Clause should apply equally to federal common law legislative immunity.

by virtue of specific statutory authority to do so. In that capacity, the Virginia Supreme Court was held to be entitled to full legislative immunity. *Id.* at 734. Accordingly, insofar as plaintiffs' suit was directed toward actions taken in their legislative capacity the dismissal of plaintiff's action against the Virginia Supreme Court and its Chief Justice was upheld.

The source of the immunity recognized by this Court in that case was federal common law, ". . . an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause." *Id.* at 732. The scope of immunity granted under the Speech of Debate Clause was analyzed in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975):

> The applicability of the Clause to private civil actions is supported by the absoluteness of the term "shall not be questioned," and the sweep of the term "in any other Place." In reading the Clause broadly we have said that legislators acting within the sphere of legitimate legislative activity "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves."[10]

The activities which are entitled to the protection of legislative immunity are those which are part of the deliberative and communicative process by which members participate in proceedings resulting in the creation of legislation. *Gravel v. United States*, 408 U.S. 606, 625 (1972).[11] The appellants' proposed inquiry of Mr. Freedman concerned the factors and motives behind the final reapportionment plan, a law of the Commonwealth of Pennsylvania. As such, it falls squarely within the scope

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10. 421 U.S. at 503.

11. *Accord, Eastland v. United States Servicemen's Fund, supra*, 421 U.S. at 503-504 and *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881).

of the privilege which has consistently been recognized by this Court.

Appellants nonetheless argue that this well-established law of legislative immunity should not be applied in a case such as this where "intent" is an element of proof. Yet, this Court has held that the privilege controls even where intent must be proved.[12] In any event, the inability of a voting rights plaintiff to depose those taking official action with the aim of obtaining direct evidence of a discriminatory intent is not the death knell of such actions. As this Court recognized in *Rogers v. Lodge*, ____ U.S. ____, No. 80-2100 (July 1, 1982), ". . . discriminatory intent need not be proven by direct evidence." The unalterable truth remains that appellants failed to produce *any* evidence of discriminatory intent.

Reapportionment in Pennsylvania is a legislative matter, a matter required to be considered and decided by the Legislative Reapportionment Commission.[13] In this instance, the Commission met repeatedly to achieve the difficult task of reapportionment. It heard and considered the various views of approximately three hundred citizens and ultimately, one plan was adopted by the Commission members as the final reapportionment plan for Pennsylvania. [A-7 through A-8]. That plan is now the law of the Commonwealth.

This process represents the very essence of what this Court has referred to as "legitimate legislative activities."[14] It is this process which the federal Speech or Debate Clause, and the federal common law legislative immunity were designed to foster by prohibiting extra-legislative questioning regarding the motivations and purposes behind a legislator's actions.

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12. *United States v. Johnson*, 383 U.S. 169, 184-185 (1966).

13. *See, Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) ("We have repeatedly recognized that state reapportionment is the task of the local legislatures or of those organs of state government selected to perform it.") and *In re Reapportionment Plan for the Pennsylvania General Assembly, supra*, 442 A.2d at 665.

14. *Tenney v. Brandhove, supra*, 341 U.S. at 376.

Appellants argue further that "extraordinary circumstances" such as those articulated in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977) justified the proposed inquiry of Mr. Freedman. Appellants were granted every opportunity in the lower court to prove such "extraordinary circumstances" and failed to meet their burden. [A-26 through A-28]. In *Arlington* this Court defined such "extraordinary circumstances" as would warrant inquiry into the purposes of official action as ". . . proof that a discriminatory purpose has been a motivating factor in the decision." *Id.* at 265-266. Appellants failed to introduce any evidence whatsoever to demonstrate that a "discriminatory purpose" had been a motivating factor behind the Final Plan. To the contrary, as observed by the lower court:

> Whatever the Commission's reasons for drawing a preliminary plan, without a district of more than 15% Hispanic population, there remains the unalterable truth that the Commission revised that plan to provide for a district with a significantly greater proportion of Hispanic voters equal to 40% of the district's population. It is more reasonable to infer from such a marked upward adjustment that the Commission considered the views of Hispanics and did what it could to accommodate them, than it is to infer that the Commission embraced the views of defendant Glancey. [A-16].

Moreover, as appellants concede [A-21], even if "extraordinary circumstances" such as would warrant inquiry into the "purpose of the official action . . ." are shown, it would not necessarily negate the privilege to which a legislator is entitled. *See, Arlington Heights, supra*, 429 U.S. at 268.

Finally, appellants rely upon this Court's holding in *United States v. Gillock*, 445 U.S. 360 (1980) in an attempt to negate the privilege. In that case, this Court

held that the privilege did not apply in a federal criminal action brought against a state legislator where ". . . important federal interests are at stake, as in the enforcement of federal criminal statutes. . . ." *Id.* at 373. No similar overwhelming federal interest exists in this case. In *Supreme Court of Virginia v. Consumers Union of the United States, Inc., supra*, this Court recognized the distinction between federal criminal and civil actions against state legislators and reaffirmed the broad privilege accorded state legislators in a case such as the present:

> Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions, *United States v. Gillock*, 445 U.S. 360 (1980), we generally have equated the legislative immunity to which state legislators are entitled under §1983 to that accorded Congressmen under the Constitution.[15]

An alleged "need" to inquire into legislative acts and motivations is not alone sufficient reason to jeopardize the principles underlying legislative immunity. *See e.g., Tenney v. Brandhove, supra*, 341 U.S. at 378 ("In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies."). The privilege was properly applied to bar inquiry of the Commission's Chairman. The purpose of the privilege has been served. As stated by James Wilson, an influential member of the Committee of Detail responsible for the federal Speech or Debate Clause:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the

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15. 446 U.S. at 733.

exercise of that liberty may occasion offence. II Works of James Wilson (Andrews ed. 1896) 38.

CONCLUSION

The Commission respectfully submits that the questions upon which this cause depends are not novel and are so unsubstantial as not to require further argument. The Commission respectfully moves the Court to affirm the judgment entered in this cause by the three-judge court in the United States District Court for the Eastern District of Pennsylvania.

Respectfully submitted,

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Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982
No. 82-39

HISPANIC COALITION ON REAPPORTIONMENT, et al.,
Appellants

v.

LEGISLATIVE REAPPORTIONMENT COMMISSION, et al.,
Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, the Democratic Party City Committee of Philadelphia, David Glancey and Robert O'Donnell move to affirm on the ground that the questions presented are so insubstantial as not to warrant further argument.

STATEMENT OF THE CASE

Appellees are in substantial agreement with Appellants' chronology of the events which occurred in the reapportionment process. Appellees note as well that the preliminary plan proposed by the Legislative Reapportionment Commission contained no House district with a Hispanic population greater than fifteen percent [J.S. App. 7]. After extensive public comment on the preliminary plan, the Commission issued a final plan containing a House district, the 180th, with a Hispanic population of forty percent [J.S. App. 8]. This final plan is now the law of the Commonwealth of Pennsylvania.

ARGUMENT

Appellees, the Democratic Party City Committee of Philadelphia, David Glancey and Robert O'Donnell, filed in the court below a motion to dismiss for improper joinder. The court granted the motion on the grounds that these parties are without authority or power to effect any of the relief sought by the Appellants [J.S.App. 13]. Appellants state that they do not contest, on appeal, the court's ruling that these Appellees were improperly joined as parties [J.S. 9]. Thus, the only issue which will be addressed in this motion to affirm is the extent to which Representative O'Donnell may assert his legislative privilege to avoid questioning during discovery and trial about his role in the reapportionment process.[1]

Appellants argue that the court below erred in applying legislative privilege to effectively bar the gathering of evidence necessary for a judicial determination in this voting rights case [J.S. i, 17]. In particular, they contend that the court below should not have granted a protective order which restricted the pretrial deposition of Appellee O'Donnell on the basis of his legislative privilege. They also argue that the direct examination of Appellee O'Donnell at trial was improperly limited by the court's construction of legislative privilege.

It should be noted at the outset that the protective order to which Appellants refer was issued in response to a motion filed by Appellee O'Donnell pursuant to Rule

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1. Appellee the Legislative Reapportionment Commission has also filed a motion to affirm the judgment of the court below, addressing the issue of the applicability of legislative privilege to Commission members. In addition, Appellee William R. Davis, Secretary of the Commonwealth of Pennsylvania, has also filed a motion to affirm the judgment of the court below. Appellee Davis' motion addresses both the court's rulings on the legislative privilege question and the ruling on the merits of Appellants' claims.

26(c) of the Federal Rules of Civil Procedure. O'Donnell's motion sought to prevent his deposition on the ground that his legislative privilege provided absolute testimonial immunity. A protective order was granted to O'Donnell by the court, but it was clearly limited in scope, as is made evident in the court's bench opinion, issued after argument on the motions:

> As far as Legislator O'Donnell is concerned, in respect to any of his legislative duties, purely legislative duties, he is entitled to the benefit of the immunity as well. . . . However, to the extent to which what is being sought from Mr. O'Donnell is purely political, having nothing to do with his status as a legislator or his legislative duties, assigned duties in the legislature, to that extent, it would seem he is not entitled to protection; he is not immune. That is to say, to the extent to which the deposition in good faith would inquire only into private, that is, activities and functions as a private person, or that are strictly political, that is, associated with political status, they are not entitled to the benefit of immunity.
>
> But he is entitled to the benefit of the immunity, the extent to which inquiry would be made as to any legislative function or role that he has. . . . For example, the court will not allow inquiry as to any legislative function that Mr. O'Donnell would have, that is, any committee duty in the legislature or any assignments he is fulfilling as a legislator. But his activities or his contact with or relationship with the City Committee or with other private persons, which contacts were not associated with the fulfillment of a legislative function or duty, that area would appear to be political and subject to discovery under the normal rules, under the normal standards provided for in Federal Rule of Civil Procedure 26.

> . . . . The motion for protective order for Representative O'Donnell is granted in part and denied in part.

[J.S.App. 43-44].

The facts and events surrounding the issuance of this ruling deserve close scrutiny. It should be noted that Appellants filed no opposition to Appellee O'Donnell's motion for a protective order. In view of the time constraints imposed by the urgency of the matter, and the fact that the issue of legislative privilege had been raised well before O'Donnell's motion was filed, the court below would not permit an extension of time to file a memorandum in opposition to the motion [J.S.App. 20-21]. However, on at least three occasions during argument on the motion, the court invited Appellants to file a motion for reconsideration of the ruling [J.S.App. 21, 37, 46]. No such motion was ever filed by Appellants.[2] Furthermore, the court urged Appellants to submit a list of proposed questions to opposing counsel in advance of the O'Donnell deposition so that any disputes over the applicability of O'Donnell's legislative privilege could be resolved by the parties or by the court, if necessary [J.S.App. 45]. No such list was ever provided. The deposition of Appellee O'Donnell was held as ordered. Appellants made no application to the court for resolution of any dispute involving the applicability of the privilege. No further discovery was sought by the Appellants.

At the trial of the case, the three-judge panel acknowledged that it had affirmed the ruling of the single judge on the applicability of legislative privilege and requested Appellants' counsel to respect the ruling in conducting his direct examination of O'Donnell [J.S.App. 107]. The privilege was, in fact, asserted by and on be-

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2. At one point during argument, Appellants' counsel requested and was granted permission to file an answering memorandum on the Monday following the issuance of the ruling [J.S.App. 37]. No memorandum was ever filed.

half of O'Donnell on five occasions during the course of the hearing [J.S.App. 83, 108, 109, 122, 124]. However, on only one occasion did the court uphold the privilege as to a particular question [J.S.App. 124]. The questioning of O'Donnell was otherwise virtually unrestricted. In addition, Appellants were permitted to recall O'Donnell to the stand twice, following his initial testimony. Counsel for Appellants requested a blanket ruling on the general availability of legislative privilege, in advance of questioning, but the court declined to issue such a ruling, stating that the applicability of the privilege could only be determined on a question by question basis:

> Mr. Kaimowitz: My motion is to rule that Mr. O'Donnell has to testify to his knowledge of those conversations [with Democratic City Committee Chairman David Glancey] and what took place between him and Mr. Glancey concerning particularly the City of Philadelphia and the development of lines for the City of Philadelphia.
>
> Judge Garth: I will not make Mr. O'Donnell testify to anything that would infringe his legislative immunity, but inasmuch as I cannot determine that, nor can the panel, in general but only on a question by question basis, you have the privilege of recalling Mr. O'Donnell if you so desire.

[J.S.App. 116]. To the extent that O'Donnell was questioned in the area delineated by Appellants' counsel, he answered without invoking his legislative privilege as to any particular question. Moreover, the court did not sustain an objection on that ground to any question in that area.

Appellees urge the Court to consider the applicable law against this background of facts.

To the extent that Appellants challenge O'Donnell's assertion of his legislative privilege in connection with his legislative functions, their arguments must fail. Appellants first argue that the issue of whether legislative

privilege may be invoked to bar the type of inquiry sought in this case has never been addressed by this Court. On the contrary, this Court has firmly established that legislative privilege may be invoked by state legislators. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), this Court recognized that state legislators enjoy a legislative privilege, rooted in common law, regarding their legislative acts. Likewise, in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980), this Court recognized the legislative privilege under federal common law in the context of a federal action against members of a state supreme court acting in a purely legislative capacity, where federal rights were asserted. Moreover, in that case, the Court also ruled that the common law legislative privilege is coextensive with the Speech or Debate Clause, U.S. Const.Art. I, §6. 446 U.S. at 732.

The breadth of the term "legislative act" was explored in *United States v. Brewster*, 408 U.S. 501 (1972). In that case, this Court dealt with the issue in the context of determining whether legislative privilege could operate to bar a federal criminal prosecution for bribery. The Court held that the privilege available under the Speech or Debate Clause protects legislators from inquiry into legislative acts or the motivation for performance of such acts, noting, however, that not all conduct *relating* to the legislative process was protected. 408 U.S. at 512. Activities such as constituent errands, the making of appointments, speeches and the like were held to be in this latter category of unprotected activity. Furthermore, the Court has sanctioned the invocation of legislative privilege by legislative aides who perform legislative acts on behalf of a legislator. *Gravel v. United States*, 408 U.S. 606, 616-617 (1972). Appellee O'Donnell is a state representative but functioned as well as an aide to Representative and Commission member Manderino during the reapportionment process [J.S.App. 109].

The Court's pronouncements in this area counsel initially that the legislative privilege is one which is deeply-rooted in our common-law jurisprudence. Its purpose is "to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. at 507. Secondly, the similarity between common law immunity and the Speech or Debate Clause permits evaluation of the issue before the Court in this case in the light of the Court's decisions construing the breadth of the federal constitutional privilege. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. at 732. Third, the view consistently espoused by this Court that legislative acts and motivations therefor are clearly covered by the privilege leads inescapably to one conclusion. That conclusion is that Appellee O'Donnell properly asserted the privilege with regard to questions concerning any reapportionment plans he may have drawn for the Commission.[3] Clearly, his contribution to the drawing of a reapportionment plan falls squarely within the definition of legislative act. The Legislative Reapportionment Commission was created for the purpose of enacting legislation, in the form of a reapportionment plan for the Commonwealth.[4] Furthermore, the privilege could have been asserted by O'Donnell to prevent any questioning as to other legislative acts he may have done or as to any motives therefor.

Appellants rely on *United States v. Gillock*, 445 U.S. 360 (1980) in support of their argument, but that reliance is misplaced. The issue before the court in that case was whether a state legislator could invoke a legislative privilege to bar introduction of evidence of his legislative acts in a federal criminal prosecution. The Court held that such a privilege could not be invoked in that

3. The only question to O'Donnell to which an objection of legislative privilege was sustained asked what reapportionment plans he drew for the House [J.S.App. 124].

4. Pa.Const., Art. II, §17.

context. The basis for the Court's holding was its belief that application of an evidentiary privilege for state legislators in the context of a federal criminal prosecution "would impair the legitimate interest of the Federal Government in enforcing its criminal statutes." 445 U.S. 369 at 373. This rationale has no applicability in this *civil* case, and *Gillock* is therefore inapposite.

Appellants next argue that the court below should have found that extraordinary circumstances in this case justified inquiry into the motives of the Legislative Reapportionment Commission and Representative O'Donnell, citing *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). Appellants appear to be arguing that extraordinary circumstances within the meaning of *Arlington* are present in this case by virtue of certain allegedly discriminatory remarks and suggestions transmitted from Appellee Glancey to Appellee O'Donnell. However, the *Arlington* decision defines extraordinary instances as being those instances where "there is proof that a discriminatory purpose has been a motivating factor in the decision." 429 U.S. at 265-266. Here, there is no proof, only allegation, that the Commission was infected by discriminatory views advanced by Glancey. Furthermore, the facts show the opposite of what Appellants alleged in their pleadings. While the preliminary plan provided for no House district with a Hispanic population greater than fifteen percent of the total, the final plan provided for a district with a Hispanic population greater than forty percent. As the court below noted, in light of these facts:

> It is more reasonable to infer from such a marked upward adjustment that the Commission considered the views of Hispanics and did what it could to accommodate them, than it is to infer that the Commission embraced the views of defendant Glancey.

[J.S.App. 16]. Appellants have thus failed to show the existence of extraordinary circumstances which might justify reliance on *Arlington*. In any event, Appellants themselves concede that in *Arlington*, this Court specifically acknowledged the availability of legislative privilege to bar the testimony of legislators concerning their motivations, even in the extraordinary instances in which legislators may be called [J.S. 21].

Appellants also argue, alternatively, that even if Appellee O'Donnell properly invoked his legislative privilege with regard to his purely legislative acts, the court below erroneously permitted him to do so with regard to acts done in his political capacity [J.S. 23].[5] They contend that O'Donnell's characterization of his actions during reapportionment considerations as legislative was not sufficient to cut off discovery for "all relevant information", or to warrant invocation of legislative privilege at trial. Appellees' recitation of the facts surrounding the issue of legislative privilege in this case demonstrate unequivocally that Appellants' own failure to seek information was the primary reason for their defeat in the court below. The protective order which was granted in part to Appellee O'Donnell was based on a ruling which specifically permitted questioning of him as to his purely private or political activities. Appellants fault the court below for its failure to ascertain and rule on "the parameters for discovery in light of the evidence before it" [J.S. 25]. Yet, the court specifically invited Appellants to offer suggested parameters for discovery, in advance of discovery, so that any dispute could be resolved by the court. Appellants failed to do so. Their uncertainty about the boundaries of the privilege is a direct result of their own failure to request the court's ruling on areas they

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5. Appellants contend initially that the Court required them to bear "the burden of showing why a protective order should not be granted" with respect to O'Donnell [J.S. 23]. Yet, the record is devoid of any suggestion that the court below shifted the burden under Rule 26 to Appellants.

wished to probe. Likewise, at trial, the panel allowed Appellants more than ample opportunity to explore O'Donnell's political acts, including virtually unlimited questioning of O'Donnell and even suggestions by the court as to appropriate questions to ask. Appellants may not blame the court for their failure to pursue the many opportunities made available to them for eliciting the information they sought.

CONCLUSION

Appellees the Democratic Party City Committee of Philadelphia, David Glancey and Robert O'Donnell respectfully submit that the questions presented in this appeal are so insubstantial as not to need further argument, and appellees respectfully move the Court to affirm the judgment of the Three-Judge District Court in the Eastern District of Pennsylvania.

Respectfully submitted,

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APPELLEE DAVIS' MOTION TO AFFIRM

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RULE:

Rule 52, Federal Rules of Civil Procedure 5

STATE CONSTITUTION:

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MOTION TO AFFIRM

Appellee William R. Davis, Secretary of the Commonwealth of Pennsylvania, by his attorneys, hereby asks this Court to affirm the decision of the United States District Court for the Eastern District of Pennsylvania dated April 6, 1982, on the grounds that the questions upon which the decision of this case depends are so insubstantial as not to require further argument.

OPINIONS AND RULINGS BELOW

The decision of the three-judge court below is reported at 536 F. Supp. 578.

ARGUMENT

I. The Findings of the District Court Are Not Clearly Erroneous or Contrary to Law

The three-judge court found that the plaintiffs had "utterly failed to provide the barest trace of evidence to support their claim that defendant [Legislative Reapportionment] Commission designed the legislative districts in Pennsylvania with the *intent* to discriminate against Hispanic voters". 536 F. Supp. at 586, emphasis in original. The appellants claim that this finding is contrary to the law and the evidence, but they have failed to present any new or substantial question for this Court's consideration. To the contrary, the legal standard in cases of this kind is well-settled and was correctly applied below, and the lower court's findings are amply supported in the record.

It is clear that, to successfully attack a state redistricting plan on a claim of racial gerrymandering, the plaintiff must, in the District Court's words, "demonstrate that the . . . plan was designed purposefully to minimize or cancel out the voting potential of racial or ethnic minorities." 536 F. Supp. at 585. *Rogers v. Lodge,* U.S. , No. 80-2100 (July 1, 1982); *Mobile v. Bolden,* 446 U.S. 55 (1980); *Whitcomb v. Chavis,* 403 U.S. 124 (1971); *Wright v. Rockfeller,* 376 U.S. 52 (1964). The appellants, however, have obliquely attacked this line of cases. They suggest that "a court examining a claim under Section 2 of the Voting Rights Act has a duty similar to that of the United States Department of Justice under Section 5" of the same Act. Juris. Statement at 15.

Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, has to do with the "preclearance" by the Justice Department of any changes in electoral practices in the states and municipalities subject to Section 5's provisions. Such areas, by definition, have histories of pervasive racial discrimination in voting matters. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).[1] Accordingly, in a Section 5 "preclearance" proceeding, the burden is upon the state or municipality to prove that its proposed change has neither a discriminatory purpose nor a discriminatory effect. *Rome v. United States*, 446 U.S. 156 (1980).

The appellants' suggestion, then, would not only shift the burden of proof in Section 2 cases from the plaintiff to the defendant, it would significantly augment that burden. Heretofore, such a defendant had only to refute any evidence of discriminatory intent; now, under the appellants' theory, such a defendant would have to affirmatively prove the lack of any such intent, and the lack of any discriminatory effect as well. The appellants' argument thus eliminates any distinction between Sections 2 and 5 of the Voting Rights Act and effectively extends the "preclearance" provisions of Section 5 to every jurisdiction in the country. This is manifestly at odds with the congressional intent, and with this Court's decisions cited above. The appellants have offered no authority to support this position,[2] and Secretary Davis submits that it is so devoid of substance as to require no further argument.

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[1] Pennsylvania is not subject to Section 5, and the appellants have not argued that it is.

[2] Section 2 of the Voting Rights Act, 42 U.S.C. §1973, was recently amended, Stat. (1982), Pub. L. 97-209, June 29, 1982. *See* Juris. Statement at 4, n. 3. The appellants have not suggested that this amendment supports their position or that it requires this Court to reconsider its earlier decisions.

The appellants next argue that the lower courts have been provided with insufficient guidance on exactly what it is that plaintiffs such as themselves must prove in order to establish that there has been intentional discrimination. Juris. Statement at 14-17. This Court, however, has explicitly declined to adopt such a checklist approach to proof of intentional discrimination. *Mobile v. Bolden, supra.* Rather, it has said:

> "Necessarily, an invidious discriminatory purpose may often be inferred from the *totality of the relevant facts. . .*" Thus determining the existence of a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."

Rogers v. Lodge, supra, slip op. at 5, citations omitted, emphasis added. *See also,* Section 2(b) of the Voting Rights Act, Stat. (1982), Pub. L. 97-209, June 29, 1982 (violation of Section 2(a) to be established based on "totality of circumstances").

The distinguishing feature of this case is not the absence of a standard of proof but the failure of the appellants, plaintiffs below, to prove anything at all. Appellants made no attempt to establish that voting in Philadelphia is along racial bloc lines; that elected officials are unresponsive to the needs of the Hispanic community; that Hispanic citizens are hampered in obtaining access to the polls; or that Hispanic citizens are denied effective participation in the political or economic life of the city. *Cf. Rogers v. Lodge, supra,* slip op. at 10-14. This comparison with *Rogers* indicates the wide areas of proof that were open to the appellants, and of which they failed to take advantage. Under such circumstances, there is no occasion for this Court to re-examine its decisions in *Rogers* and *Mobile.*

The appellants argue strenuously, however, that the three-judge court failed to draw the appropriate inferences from such evidence as they did present. Juris. Statement at 10-14. Of course, in an appeal from a three-judge court, as in any appellate matter, Fed. Rule Civ. Proc. 52 requires that the trial court's findings of fact not be set aside unless they are "clearly erroneous." *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). Findings of intentional discrimination (or the lack thereof) are factual in nature and are governed by the "clearly erroneous" standard. *Rogers v. Lodge, supra,* slip op. at 10. There is no clear error here.

The appellants rely on the following allegations: that one David Glancey,[8] acting on behalf of the Democratic Party in Philadelphia, made certain suggestions to the Legislative Reapportionment Commission regarding redistricting in the city; that Glancey's suggestions intentionally fragmented the Hispanic community; that the Commission then published a preliminary redistricting plan which adopted Glancey's suggestions in all material respects; and that the Commission thereafter, in adopting its final plan, failed to create a Hispanic majority district, although it had been told that it was possible to do so. This, according to the appellants, *required* the District Court to find an intent to discriminate on the part of the Commission. The District Court declined to do so, however, and its findings are well supported by the record.

First, the District Court found, based on evidence in the record, that Glancey's purpose in proposing a fragmentation of the Hispanic community was not to discrimi-

[8] Mr. Glancey was a defendant below and is an appellee in this Court, and is separately represented.

nate against Hispanic persons. Rather, he saw his proposals as being in the nature of a bargaining position: they were the first step in a lengthy process, in the course of which Glancey fully intended the Hispanic fragmentation to be remedied, and the end result of which was to be a competitive advantage for Glancey in his partisan battles with the Republicans. 536 F. Supp., at 580; App. to Juris. Statement at A-99 to A-101, A-156 to A-157. Second, the District Court found that, whatever may have been Mr. Glancey's intentions, there was no evidence that the Commission knew of or shared them.[4] 536 F. Supp. at 585. Third, the District Court pointed out that the Commission's preliminary plan was submitted to public scrutiny, and that the Commission received written and oral comments on this very point from Hispanic citizens. 536 F. Supp., at 581.

Finally, and most importantly, there remained what the District Court called,

> the unalterable truth that the Commission revised that [preliminary] plan to provide for a district with a significantly greater proportion of Hispanic voters equal to 40% of the district's population. It is more reasonable to infer from such a marked upward adjustment that the Commission . . . did what it could to accommodate [the views of Hispanics], than it is to infer that the Commission embraced the views of defendant Glancey. 536 F. Supp., at 585-586.

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[4] By constitutional mandate, the Legislative Reapportionment Commission is a bipartisan body, consisting of two legislators from each party, plus a chairman chosen by them. Pa. Const. Ann. (Purdon), Art. 2, §17. This tends to refute any suggestion that the Commission was the captive of the Democratic Party.

The appellants argue, however, that this "marked upward adjustment"—from 15% to 40%—was not enough, and that the District Court should have inferred a discriminatory intent because the Commission did not create a district with the maximum possible concentration of Hispanic persons. No such inference was justified. Redistricting bodies may properly take racial factors into account, *United Jewish Organizations v. Carey*, 430 U.S. 144, 165-168 (1977), but they are not obliged to maximize the concentration of any racial group. If every such group were entitled to a majority district whenever one could theoretically be created, we would be well on the way to a theory of proportional representation which has been repeatedly rejected by this Court. *Mobile v. Bolden, supra; Whitcomb v. Chavis, supra.*

Appellants have therefore provided this Court with no grounds on which to reverse the District Court's findings, and those findings should be affirmed.

II. The District Court Properly Sustained the Invocation of Legislative Privilege by Some of the Defendants

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The appellants attempted below to take the deposition of James O. Freedman, the Chairman of the Commission, and took the deposition of defendant Robert O'Donnell, a state legislator who also served as a staff assistant to one of the Commission members. App. to Juris. Statement at A-19 to A-48. The appellants also examined Mr. O'Donnell at trial. *Id.* at A-107 to A-111, A-117 to A-121. Both Mr. Freedman and Mr. O'Donnell invoked the legislative privilege. The District Court sustained the invocation of the privilege as to Mr. Freedman, and sustained it in part as to Mr. O'Donnell. *Id.* at A-44, A-107.

The Legislative Reapportionment Commission and Mr. O'Donnell, separately represented, are appellees in this matter. It is Secretary Davis' understanding that each of these parties intends to file a motion to affirm in which the legislative privilege issue will be addressed, and he believes that this issue will be most effectively addressed by those parties who are most directly involved. Rather than repeat their arguments here, Secretary Davis simply notes his position that the District Court's rulings on this issue were correct.

CONCLUSION

For the foregoing reasons, Appellee William R. Davis asks this Court to affirm the order of the court below.

Respectfully submitted,

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